UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5777 & 93-5794

CHEMICAL LEAMAN TANK LINES, INC.

v.

THE AETNA CASUALTY AND SURETY COMPANY; and CERTAIN UNDERWRITERS AT LLOYDS, LONDON, subscribing to Insurance Policies Numbers WAR 6771, WAR 6772/A, C62P 10-117, L62P 10-117, 64P 3-121, L64P 3-121A, L64P 3-121B, C64P 3-121B, C65P 5-119, C65P 5-119A, L65P 5-119A, L66P 5-119A, C67P 4-158, L67P 4-158, C68P 2-116, L68P 2-116, C68P 2-116A, C68P 2-116B, L68P 2-116A, L68P 2-116B, C71-03-03-13, L71-03-03-13, C71-03-03-13A, C71-03-03-13B, L71-03-03-13A, L71-03-03-13B, C74-03-18-02, 77-01-19-23, 77-01-19-23A, C77-01-19-23B, 79-04-19-10, C80-02-19-09, C80-02-19-09B, L80-02-09A, L80-02-19-09A, L80-02-19-09B, C83-02-19-09, L83-02-19-09A, L83-02-19-09B, L83-02-19-09C

ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyds, London, individually and in his capacity as representative Underwriter at Lloyds, London for certain subscribing Underwriters at Lloyds, London who subscribed to certain liability insurance policies issued to plaintiff Chemical Leaman Tank Lines, Inc.; ACCIDENT AND CASUALTY COMPANY OF WINTERTHUR; ALBA GENERAL INSURANCE COMPANY LTD.; ALLIANZ CORNHILL INTERNATIONAL INSURANCE PLC, FORMERLY KNOWN AS ALLIANZ INTERNATIONAL INSURANCE COMPANY LTD.; ANGLO-FRENCH INSURANCE COMPANY LTD.; ARGONAUT NORTHWEST INSURANCE COMPANY; ASSICURAZIONI GENERALI SPA; BALOISE FIRE INSURANCE COMPANY; BELLEFONTE INSURANCE

COMPANY LTD.; BRITISH NATIONAL LIFE INSURANCE SOCIETY LTD.; CNA INTERNATIONAL REINSURANCE CO. LTD., FORMERLY KNOWN AS CNA REINSURANCE OF LONDON LTD.; DELTA LLOYD NON-LIFE INSURANCE COMPANY; DOMINION INSURANCE COMPANY LTD.; DRAKE INSURANCE COMPANY LTD.; EDINBURGH INSURANCE COMPANY; EXCESS INSURANCE COMPANY LTD.; FIDELIDADE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; HELVETIA ACCIDENT SWISS INSURANCE COMPANY; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; LEXINGTON INSURANCE COMPANY, LTD.; LONDON & OVERSEAS INSURANCE COMPANY, LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; LONDON & SCOTTISH ASSURANCE CORPORATION, LTD.; GAN MINSTER INSURANCE COMPANY, FORMERLY KNOWN AS MINSTER INSURANCE COMPANY LTD.; NATIONAL CASUALTY COMPANY; NATIONAL CASUALTY INSURANCE OF AMERICA, LTD.; NEW LONDON REINSURANCE COMPANY, LTD.; NORTH ATLANTIC INSURANCE COMPANY LTD., FORMERLY KNOWN AS BRITISH NATIONAL INSURANCE CO. LTD.; ORION INSURANCE COMPANY LTD.; PINE TOP INSURANCE COMPANY LTD.; RIVER THAMES INSURANCE COMPANY LTD.; SCOTTISH LION INSURANCE COMPANY; SOVEREIGN MARINE AND GENERAL INSURANCE COMPANY, LTD.; SPHERE INSURANCE COMPANY LTD.; ST. KATHERINE INSURANCE COMPANY LTD.; STRONGHOLD INSURANCE COMPANY LTS.; SWISS UNION GENERAL INSURANCE COMPANY LTD.; TAISHO MARINE & FIRE INSURANCE COMPANY (EUROPE) LTD., FORMERLY KNOWN AS TAISHO MARINE & FIRE INSURANCE COMPANY (U.K.) LTD.; TOKIO MARINE & FIRE INSURANCE COMPANY (U.K.) LTD.; TUREGUM INSURANCE COMPANY LTD.; UNIONAMERICA INSURANCE COMPANY; UNITED

STANDARD INSURANCE COMPANY LTD.; WINTERTHUR SWISS INSURANCE COMPANY; WORLD AUXILIARY INSURANCE CORPORATION LTD.; YASUDA INSURANCE COMPANY (U.K.) LTD. (hereinafter collectively referred to as "Jackson & Companies"),

Appellants at No. 93-5777

AETNA CASUALTY AND SURETY COMPANY ("AETNA")

Appellant at No. 93-5794

(D.C. Civ. No. 89-cv-1543)

SUR PETITION FOR REHEARING

Present: BECKER, STAPLETON, MANSMANN, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellants Robin Anthony Gildart Jackson, an Underwriter at Lloyds, London, et al. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge McKee would grant rehearing.

BY THE COURT,

/s/ Scirica

CIRCUIT JUDGE

Dated: July 22, 1996

CHEMICAL LEAMAN TANK LINES, INC.

v.

The AETNA CASUALTY AND SURETY COMPANY; and Certain Underwriters At Lloyds, London, subscribing to Insurance Policies Numbers WAR 6771, WAR 6772/A, C62P 10-117, L62P 10-117, 64P 3-121, L64P 3-121A, L64P 3-121B, C64P 3-121B, C65P 5-119, C65P 5-119A, L65P 5-119A, L66P 5-119A, C67P 4-158, L67P 4-158, C68P 2-116, L68P 2-116, C68P 2-116A, C68P 2-116B, L68P 2-116A, L68P 2-116B, C71-03-03-13, L71-03-03-13, C71-03-03-13A, C71-03-03-13B, L71-03-03-13A, L71-03-03-13B, C74-03-18-02, 77-01-19-23, 77-01-19-23A, C77-01-19-23B, 79-04-19-10, C80-02-19-09, C80-02-19-09B, L80-02-09A, L80-02-19-09A, L80-02-19-09B, C83-02-19-09, L83-02-19-09A, L83-02-19-09B, L83-02-19-09C,

Robin Anthony Gildart Jackson, an Underwriter at Lloyds, London, individually and in his capacity as representative Underwriter at Lloyds, London for certain subscribing Underwriters at Lloyds, London who subscribed to certain liability insurance policies issued to plaintiff Chemical Leaman Tank Lines, Inc.; Accident and Casualty Company of Winterthur; Alba General Insurance Company Ltd.; Allianz Cornhill International Insurance PLC, Formerly Known as Allianz International Insurance Company Ltd.; Anglo-French Insurance Company Ltd.; Argonaut Northwest Insurance Company; Assicurazioni Generali Spa; Baloise Fire Insurance Company; Bellefonte Insurance Company Ltd.; British National Life Insurance Society Ltd.; CNA International Reinsurance Co. Ltd., Formerly Known as CNA Reinsurance of London Ltd.; Delta Lloyd Non-Life Insurance Company; Dominion Insurance Company Ltd.; Drake Insurance Company Ltd.; Edinburgh Insurance Company; Excess Insurance Company Ltd.; Fidelidade Insurance Company; Folksam International Insurance Company (U.K.) Ltd.;

Helvetia Accident Swiss Insurance Company; Indemnity Marine Assurance Company, Ltd.; Lexington Insurance Company Ltd.; London & Overseas Insurance Company, Ltd.; London & Edinburgh Insurance Company, Ltd.; London & Scottish Assurance Corporation, Ltd.; Gan Minster Insurance Company, Formerly Known As Minster Insurance Company Ltd.; National Casualty Company; National Casualty Insurance of America, Ltd.; New London Reinsurance Company, Ltd.; North Atlantic Insurance Company Ltd., Formerly Known as British National Insurance Co. Ltd.; Orion Insurance Company Ltd.; Pine Top Insurance Company Ltd.; River Thames Insurance Company Ltd.; Scottish Lion Insurance Company; Sovereign Marine And General Insurance Company, Ltd.; Sphere Insurance Company Ltd.; St. Katherine Insurance Company Ltd.; Stronghold Insurance Company Ltd.; Swiss Union General Insurance Company Ltd.; Taisho Marine & Fire Insurance Company (Europe) Ltd., Formerly Known As Taisho Marine & Fire Insurance Company (U.K.) Ltd.; Tokio Marine & Fire Insurance Company (U.K.) Ltd.; Turegum Insurance Company Ltd.; Unionamerica Insurance Company; United Standard Insurance Company Ltd.; Winterthur Swiss Insurance Company; World Auxiliary Insurance Corporation Ltd.; Yasuda Insurance Company (U.K.) Ltd. (hereinafter collectively referred to as "Jackson & Companies"), Appellants at No. 93-5777,

Aetna Casualty and Surety Company ("AETNA"), Appellant at No. 93-5794.

No. 93-5777, 93-5794.

United States Court of Appeals,
Third Circuit.

Argued Sept. 26, 1994.

Decided Oct. 12, 1995.

Petition for Panel Rehearing Granted
and Opinion and Judgment Vacated
Dec. 15, 1995.

Submitted on Petition for
Panel Rehearing Dec. 15, 1995.

Decided June 20, 1996.

Order Denying Rehearing and
Rehearing In Banc July 22, 1996.

Insured sought declaration that its primary and excess comprehensive general liability (CGL) policies provided coverage for costs of cleaning up environmental contamination at and around its tank-truck cleaning facility. In separate opinions, the United States District Court for the District of New Jersey, Stanley S. Brotman, J., 788 F.Supp. 846 and 817 F.Supp. 1136, granted some motions for summary judgment and denied others, and after jury trial resulted in verdict of partial coverage, insurers appealed. On panel rehearing, the Court of Appeals, Scirica, Circuit Judge, held that: (1) instruction on "occurrence" issue properly directed jury to focus on whether specific property damage at issue was expected or intended by insured; (2) *Voorhees* "exceptional circumstances" rule allowing insured's intent to injure to be presumed did not apply; (3) *Morton* regulatory estoppel rule applied to nonstandard pollution exclusion in insured's excess policies; (4) insurers did not preserve error as to jury instruction on pollution exclusion, and instruction was not plain error; (5) evidence of environmental problems at other facilities operated by insured was inadmissible; (6) under continuous trigger, allocation of liability among the policies had to be risk-based, rather than joint and several; (7) property damage occurred as matter of law during ten successive policy periods following insured's initial discharge of contaminants; and (8) insured's four-year delay in providing notice of claim did not relieve insurers of their coverage obligations.

Affirmed in part and remanded.

McKee, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Opinion superseded, 68 F.3d 658.

1. Insurance k437.1(1)

Under New Jersey law, insured had burden of proving that it did not expect or intend to cause property damage in order to establish coverage under its occurrence-based comprehensive general liability (CGL) policies for costs of cleaning up environmental contamination at and around its tank-truck cleaning facility.

2. Federal Courts k754.1

Court of Appeals' review of jury instructions is plenary.

3. Federal Civil Procedure k2182.1

Jury charge, taken as whole, must fairly and adequately submit issues in case to jury.

4. Insurance k669.6(3)

Under New Jersey law, instruction properly directed jury to focus on whether specific property damage at issue — namely, contamination to soil, groundwater, and wetlands at and around insured's tank-truck cleaning facility — was expected or intended by insured, with respect to issue of whether there had been "occurrence" as required for coverage for costs of cleaning up the contamination under insured's comprehensive general liability (CGL) policies; focus on whether insured intended some sort of injury would have been improper.

5. Insurance k433.2

Under New Jersey law, "occurrence" requirement for liability insurance coverage for costs of cleaning up environmental contamination is not satisfied when insured intended or expected its actions to cause environmental harm of

particular sort, unless the harm that actually resulted was improbable.

6. Insurance k433.2

Under New Jersey law, "occurrence" requirement does not operate to preclude liability insurance coverage for costs of cleaning up environmental contamination where insured had intent to cause environmental harm of one sort but other kinds of unintended and unexpected environmental harm resulted.

7. Insurance k433.2

Under New Jersey law, *Voorhees* "exceptional circumstances" rule for determining whether "occurrence" requirement for coverage under liability insurance policy is satisfied, which allows insured's intent to injure to be presumed without inquiry into insured's subjective intent in cases of egregious conduct, did not apply to insured's conduct leading to contamination of soil, groundwater, and wetlands at and around its tank-truck cleaning facility, where insured did not engage in pattern of stonewalling characterized by promises of compliance that consistently were unfulfilled.

8. Insurance k138(4)

Under New Jersey law, *Morton* regulatory estoppel rule, which bars liability insurers from enforcing standard-form pollution exclusion containing exception for "sudden and accidental" discharges on grounds that insurance industry misled state regulators in securing approval of exclusion, applied to nonstandard pollution exclusion in insured's excess comprehensive general liability (CGL) policies, where it used word "sudden," it closely tracked language of standard exclusion, and it came into use at about same time as standard exclusion, regardless of whether insurers who issued the policies containing the nonstandard exclusion directly made misrepresentations to regulators.

9. Federal Civil Procedure k2602

Defendant liability insurers' objection to jury charge on scope of pollution exclusion could not serve as predicate for renewed motion for judgment after trial, or motion for j.n.o.v., where district court did not explicitly treat the objection as motion for judgment as matter of law, or directed verdict motion. Fed.Rules Civ.Proc.Rule 50(a), (a)(2), (b), 28 U.S.C.A.

10. Federal Courts k637

Defendant liability insurers' objection to jury charge on scope of pollution exclusion was insufficient to preserve argument for appeal, in insured's action seeking coverage for costs of cleaning up environmental contamination, where objection was difficult to understand due to convoluted grammar and did not specify authority upon which it was based. Fed.Rules Civ.Proc.Rule 51, 28 U.S.C.A.

11. Federal Courts k621

In absence of party's preservation of assigned error for appeal, Court of Appeals reviews for plain error, and its power to reverse is discretionary.

12. Federal Courts k621

Particularly in civil context, Court of Appeals exercises its power to reverse for plain error sparingly.

13. Federal Courts k630.1

Plain error warranting exercise of Court of Appeals' discretionary power to reverse was not presented by instruction requiring proof that insured intended discharge of known pollutants into groundwater, as opposed to into environment generally, in order for pollution exclusion in its comprehensive general liability (CGL) policies to preclude coverage for costs of cleaning up groundwater damage.

14. Evidence k146

Evidence of environmental problems at other tank-truck cleaning facilities operated by insured was inadmissible, due to its probative value being substantially outweighed by danger of prejudice and jury confusion and delay, in insured's action seeking liability coverage for costs of cleaning up environmental contamination at and around one particular facility, where series of minitrials relating to each facility would have been required for jury to properly evaluate the evidence. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

15. Insurance k178.6

Under New Jersey law, continuous trigger theory for identifying time of "occurrence" for purposes of liability insurance coverage extends to property damage claims resulting from long-term environmental contamination.

16. Insurance k178.6

Under New Jersey law, continuous trigger theory for identifying time of "occurrence" for purposes of liability insurance coverage did not make all of insured's successive, applicable liability policies jointly and severally liable for long-term environmental contamination at and around its tank-truck cleaning facility, but rather required risk-based allocation of liability among the policies in accordance with *Owens-Illinois.*

17. Insurance k178.6

Under New Jersey's continuous trigger theory for identifying time of "occurrence" for purposes of liability insurance coverage, exposure to harm-causing agent is sufficient to trigger potential coverage, and actual manifestation of injury is not required, so long as there is continuous, indivisible process resulting in damage.

18. Insurance k178.6

Under New Jersey's continuous trigger theory for identifying time of "occurrence" for purposes of liability insurance

coverage, property damage occurred as matter of law during each of ten successive comprehensive general liability (CGL) policy period, in connection with environmental contamination at and around insured's tank-truck cleaning facility, where insured discharged contaminated rinsewater into unlined ponds and lagoons in every year at issue, and contaminated rinsewater from three settling ponds started migrating through soil to underlying groundwater almost immediately after pond operation began.

19. Insurance k669.2

Jury instruction stating that insured could be entitled to coverage under comprehensive general liability (CGL) policies for environmental property damage that occurred during policy period but that originally began during earlier policy period was proper under New Jersey's continuous trigger theory for identifying time of "occurrence" for purposes of liability insurance coverage.

20. Insurance k539.8

Under New Jersey law, insured's four-year delay in providing notice to its comprehensive general liability (CGL) insurers of claim for costs of cleaning up environmental contamination at and around insured's tank-truck cleaning facility did not relieve insurers of their coverage obligations, where the untimely notice did not leave insurers with inadequate evidentiary record or otherwise cause them to irretrievably lose any substantial right, and insurers' ability to defend against underlying claim was not adversely affected.

21. Insurance k539.1

Under New Jersey law, insured's contractual obligation to notify its comprehensive general liability (CGL) insurers of environmental contamination at and around insured's tank-truck cleaning facility did not arise until Environmental Protection Agency (EPA) placed site on Superfund National Priorities List, which ultimately led to the clean-up cost liability for which insured was seeking coverage, and did not arise some 20 years earlier when insured first received complaints

from various regulatory bodies, especially since prior New Jersey state actions had sought only nonmonetary injunctive relief.

Henry Lee (Argued), Gary P. Schulz, John G. McAndrews, Hannah M. O'Driscoll, Mendes & Mount, New York City, William J. Hanley, Ronca, McDonald & Hanley, Livingston, New Jersey, for Appellants at No. 93-5777.

Brian J. Coyle (Argued), Peter E. Mueller, Harwood Lloyd, Hackensack, New Jersey, William H. Jeffress, Jr., Miller, Cassidy, Larroca & Lewin, Washington, DC, Edward M. Dunham, Jr., Miller, Dunham & Doering, Philadelphia, Pennsylvania, for Appellant, Aetna Casualty and Surety Company.

Kevin B. Clark (Argued), John P. Dean, Conrad J. Smucker, Willkie, Farr & Gallagher, Washington, DC, for Appellee, Chemical Leaman Tank Lines, Inc.

Thomas W. Brunner, Wiley, Rein & Fielding, Washington, DC, for Amicus Curiae Appellant, Insurance Environmental Litigation Association.

Karen L. Jordan, Office of Attorney General of New Jersey, Department of Law & Public Safety, Trenton, New Jersey, for Amicus Curiae Appellee, State of New Jersey, New Jersey Department of Environmental Protection & Energy.

Before SCIRICA, NYGAARD and McKEE, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

Chemical Leaman Tank Lines, Inc. brought this declaratory judgment action against Aetna Casualty and Surety Company and the London Market Insurers, seeking a declaration that defendants' insurance policies covered the cost of environmental clean-up at Chemical Leaman's Bridgeport, New Jersey facility. After a three week trial, a jury found Chemical

Leaman was entitled to partial coverage under several policies. Thereafter the New Jersey Supreme Court decided *Morton Intern., Inc. v. General Acc. Ins. Co.*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994), which interprets several key provisions of comprehensive general liability insurance policies in the context of environmental pollution. Defendant insurers now appeal, contending the district court incorrectly instructed the jury on whether Chemical Leaman "expected or intended" to cause environmental damage under *Morton*. We believe *Morton* requires an inquiry into the insured's subjective intent to cause environmental harm, unless "exceptional circumstances" support a presumption of the insured's subjective intent. Therefore we conclude the district court's jury instructions were proper.

Defendant insurers raise several other issues on appeal. They argue the district court mistakenly limited the applicability of the policies' pollution exclusion clause, incorrectly adopted the "continuous trigger" theory as New Jersey law, and ignored the prejudicial effect of Chemical Leaman's failure to file its claims for coverage in a timely manner. They also dispute the district court's exclusion of evidence relating to environmental contamination at other Chemical Leaman facilities. We will affirm the district court's holdings on the pollution exclusion clause, the "continuous trigger" theory, and timely notice. We also conclude that the exclusion of certain evidence was within the sound discretion of the district court.[1]

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[1] The district court's opinions granting partial summary judgment are reported at *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 788 F.Supp. 846 (D.N.J.1992), and *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 817 F.Supp. 1136 (D.N.J.1993).

Our initial opinion in this case was vacated on a petition for rehearing in banc. *See Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 68 F.3d 658 (3d Cir.1995), *vacated* 68 F.3d 685 (3d Cir.1995).

I. Background

A. Contamination at the Bridgeport Facility

Chemical Leaman Tank Lines, Inc., a tank truck company that specializes in the transport of chemicals and other liquids, operates a number of tank truck cleaning facilities around the country, including one in Bridgeport, New Jersey. At the Bridgeport facility, Chemical Leaman disposed of rinsewater contaminated with chemical residue during the cleaning process into a water treatment system designed by Harry Elston, Chemical Leaman's Manager of Real Estate and Engineering, and Harry Wagner, a professional sanitary engineer. At its inception in 1960, the Bridgeport water treatment system consisted of three unlined ponds connected by "tee pipes." The ponds were intended to purify rinsewater by filtering out contaminants as the water seeped into the soil. The designers of the system believed that the forces of gravity would separate contaminates from the rinsewater, and that natural processes of aerobic and anaerobic microbial degradation would break down trace contaminants. An overflow pipe drained from the final pond of the water treatment system into an adjacent swamp in order to allow water to escape in the case of heavy rains.

In September 1961, an Inspector with the New Jersey Division of Fish Game & Wildlife informed Chemical Leaman that its water treatment system was "not satisfactory." In response, Chemical Leaman constructed two additional aeration lagoons and a settling lagoon with a limestone bed. The lagoons were designed to function in the same manner as the first three ponds. But the overflow pipe still drained from the last lagoon into the neighboring swamp.

Water pollution inspectors with the New Jersey Department of Health observed discharge from the overflow pipe into the swamp in November 1968. They found the discharge to be "highly pollutional" and ordered Chemical Leaman to submit a plan to improve its water treatment system. In May 1969, Chemical Leaman submitted a plan, but state regulators found it to be unsatisfactory. Thereafter state regulators and

Chemical Leaman unsuccessfully attempted to reach agreement. Finally, on January 28, 1974, Chemical Leaman and the New Jersey Department of Environmental Protection entered into a consent decree in which Chemical Leaman agreed to construct an approved water treatment facility. In 1975, Chemical Leaman arranged for its wastewater to be treated by Du Pont and ceased to use the system of ponds and lagoons. Subsequently, Chemical Leaman drained the ponds and lagoons, dredged them, and filled them with brickbat, sand and concrete.

In 1980, a routine survey by the New Jersey Department of Environmental Protection discovered groundwater contamination at and around the Bridgeport site. Subsequent investigations established that the ponds and lagoons were the primary source of groundwater contamination on the site, and that several private wells near the facility were either contaminated or threatened with contamination. The federal Environmental Protection Agency placed the Bridgeport site on the Superfund National Priorities List in 1984, and, in 1985, Chemical Leaman entered into a consent order with the EPA. Chemical Leaman admitted liability under the Comprehensive Environmental Response, Compensation and Liabilities Act ("CERCLA") and agreed to remediate the Bridgeport site or to pay for its remediation.

Chemical Leaman gave notice of claims to Aetna in April 1988, and to the London Market insurers ("LMI") in March 1989. Aetna and the LMI refused to defend or indemnify Chemical Leaman for costs incurred in connection with the clean-up of the Bridgeport site. Chemical Leaman then filed this suit.

B. The Insurance Policies

Chemical Leaman purchased comprehensive general liability insurance from Aetna covering successive years from April 1, 1959 through April 1, 1985. It purchased excess comprehensive general liability policies covering the same period from the LMI. The LMI challenge the district court's interpretation of several provisions of the policies purchased

by Chemical Leaman. Because Aetna has withdrawn from this appeal, we need not discuss its policies.

The LMI policies were standard form "occurrence-based" policies, meaning they insured against "occurrences" as defined in the policies. The insuring clause in the LMI policies typically stated that the LMI agreed:

> [s]ubject to the limitations, terms and conditions [of the policy] to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability ... imposed upon the Assured by law, ... for damages ... on account of: ... (ii) Property Damage ... caused by or arising out of each occurrence.[2]

The LMI policies defined "occurrence" as "[a]n accident or a happening or event or a continuous or repeated exposure to conditions which *unexpectedly and unintentionally* results in ... property damage ... during the policy period" (emphasis added). The combined effect of the insuring clause and the definition of "occurrence" is to preclude coverage for property damage that is expected or intended by the insured. On appeal, the LMI contend the district court incorrectly instructed the jury on the legal standard by which to evaluate Chemical Leaman's expectation or intention to cause property damage.

Each LMI policy in effect from 1971 to 1985 also contained a pollution exclusion clause. The LMI policies in effect from April 1, 1971 to April 1, 1974, and from April 1, 1977 to April 1, 1985 contained the standard form exclusion known as NMA 1685. NMA 1685 does not cover personal injury or

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[2] The LMI's earlier policies insured against "accidents" as opposed to "occurrences." New Jersey law defines an "accident" in the same manner as an "occurrence;" namely, as an event neither expected nor intended by the insured. The district court therefore held that Chemical Leaman bore the same burden of proof under both types of policies. *See Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. 1136, 1148 (D.N.J.1993). The LMI do not challenge this holding on appeal.

property damage caused by seepage, pollution, or contamination unless "such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of [the] insurance." The LMI policies in effect from April 1, 1974 to April 1, 1977 contained the standard industry pollution exclusion clause, the so-called "ISO" pollution exclusion, which precludes coverage for pollution and contamination, unless the "discharge, dispersal, release or escape is sudden and accidental." Both the ISO pollution exclusion clause and the NMA 1685 pollution exclusion clause focus on the insured's intention and expectation to discharge pollutants, not on the insured's intention or expectation to cause property damage. On appeal, the LMI argue the pollution exclusion clauses bar coverage under the 1971 to 1985 policies because Chemical Leaman's discharges of pollutants were not sudden, unintended, or unexpected.

Finally, the LMI policies require the insured to provide written notice "as soon as practicable" following an occurrence. The LMI argue that Chemical Leaman's failure to comply with this provision bars coverage.

II. Procedural History

Chemical Leaman filed this declaratory judgment action in 1989 after the insurers' refusal to indemnify it for the costs of environmental clean-up at the Bridgeport facility. Following extensive discovery, the parties filed cross-motions for summary judgment on various grounds. The district court granted partial summary judgment in favor of Chemical Leaman, holding that New Jersey law applied, and that the "owned property exclusion" did not bar coverage for the costs of remediation of onsite soil contamination designed to correct injury to surrounding properties. *See Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 788 F.Supp. 846 (D.N.J.1992).

After subsequent cross-motions for summary judgment, the district court held Chemical Leaman bore the burden of proving it did not subjectively expect or intend the damage to the soil and groundwater for which it sought coverage. *See*

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 817 F.Supp. 1136, 1146 (D.N.J.1993). It also found Chemical Leaman's actions were not so "reprehensible" as to objectively establish that it expected or intended to cause damage. *Id.* The court then denied the cross-motions for summary judgment because there remained genuine issues of fact about Chemical Leaman's subjective intent. *Id.* at 1152.

The district court also held as a matter of law that damage to the soil and groundwater occurred during the April 1, 1960 to April 1, 1961 policy year because Chemical Leaman began depositing rinsewater in the ponds during that time period.[3] The district court noted that from 1960 to 1975, Chemical Leaman disposed of 10,000 to 20,000 gallons of rinsewater into the ponds each day, but did not find that property damage occurred during that period as a matter of law. *Id.* Rather, it ruled that New Jersey follows the "continuous trigger" theory and that factual issues remained as to whether Chemical Leaman suffered continuous, indivisible property damage from 1961 to 1985.

The district court interpreted the pollution exclusion clauses in the LMI's post-1971 policies as precluding coverage "when the insured has caused the discharge of contaminants or pollutants, unless the discharge was neither expected nor intended from the standpoint of the insured." *Id.* at 1157. On the basis of the pollution exclusion clauses, the district court granted partial summary judgment in favor of defendants as to soil damage on the post-1971 policies. It denied summary judgment with respect to groundwater contamination, and did not address contamination to the surrounding wetlands. *Id.* Finally, the district court held Chemical

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[3] The date on which the insured suffers property damage is important because it determines whether an "occurrence" has taken place under the applicable insurance policies. *See Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 483 A.2d 402, 409 (1984). The district court granted the insurers summary judgment on the April 1, 1959 to April 1, 1960 policy, because Chemical Leaman produced no evidence that damage occurred during that time period.

Leaman's failure to give timely notice of its claims did not preclude insurance coverage because the delay had not prejudiced the defendant insurers. *Id.* at 1157-58.

Before trial, Chemical Leaman filed a motion *in limine* to exclude evidence relating to waste disposal sites other than Bridgeport. The district court granted the motion, holding the other-site evidence more prejudicial than probative and unduly time consuming.

After a three week trial, the jury found that Chemical Leaman was entitled to coverage for damage to the soil and wetlands under the April 1, 1960 to April 1, 1971 policies, and to coverage for damage to the groundwater under the April 1, 1960 to April 1, 1981 policies.[4] In reaching its verdict, the jury answered detailed interrogatories on Chemical Leaman's intent and expectation to cause property damage and to discharge pollutants during each policy year. After oral argument before this Court, Chemical Leaman and Aetna settled all claims arising from this dispute.[5] The LMI now appeals the district court's legal determinations and the jury's verdict.

We have jurisdiction to review the final judgment of the district court under 28 U.S.C. § 1291. The district court held New Jersey law governs, which the parties do not dispute. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 788 F.Supp. at 851. As a federal court sitting in diversity, we must apply the substantive law of New Jersey. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 613 (3d Cir.1992). Our review of the district court's interpretation of New Jersey law is plenary. *Wiley v. State Farm Fire & Cas. Co.*, 995 F.2d 457, 459 (3d Cir.1993).

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[4] The parties appear to agree that Chemical Leaman has dismissed its claims against the LMI on the 1981-85 policies, although it is unclear from the record when or why this occurred.

[5] Aetna and the LMI each incorporated the arguments advanced by the other, and so, accordingly, we must still address the issues raised by Aetna as they relate to the LMI.

III. Occurrence-Based Insurance Policies and "Expected or Intended"

[1] Chemical Leaman purchased "occurrence-based" comprehensive general liability insurance from the LMI that provided coverage for "[a]n accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in ... property damage." The LMI contend that because Chemical Leaman "expected" or "intended" to cause property damage at the Bridgeport site, the policies do not provide coverage.[6]

New Jersey courts have been called upon repeatedly to interpret the "expected/intended" clause in occurrence-based insurance policies. They have sought to balance the need to compensate victims against the public policy of deterring intentional wrongdoing by denying coverage for its consequences. In companion cases, *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 607 A.2d 1255 (1992), and *SL Industries, Inc. v. American Motorists Ins. Co.*, 128 N.J. 188, 607 A.2d 1266 (1992), the New Jersey Supreme Court addressed how the "expected/intended" clause should be interpreted in order to strike the correct balance.

In *Voorhees*, the New Jersey Supreme Court held the accidental nature of an occurrence is determined by analyzing whether the insured subjectively intended or expected to cause an injury. *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d at 1264. The court explained:

> That interpretation prevents those who intentionally cause harm from unjustly benefitting from

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[6] Under New Jersey law, an insured must prove that a coverable loss has occurred. *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 258 N.J.Super. 167, 609 A.2d 440, 464 (App.Div.1992), *certif. denied*, 134 N.J. 481, 634 A.2d 528 (1993). Accordingly, the district court correctly required Chemical Leaman to prove it did not expect or intend to cause property damage in order to establish coverage under the applicable insurance policies. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. at 1144.

> insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.

Id. at 1264. The court emphasized, "[e]ven when the actions in question seem foolhardy and reckless, the courts have mandated an inquiry into the actor's subjective intent to cause injury." *Id.*

The court also recognized an "exceptional circumstances" exception to the subjective intent inquiry.

> When the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure. That objective approach focuses on the likelihood that an injury will result from an actor's behavior rather than on the wrongdoer's subjective state of mind.

Id. at 1265. The court cited to sexual assault against children as an example of an act that is "so inherently injurious" that an intent to injure can be presumed. *Id.*

In *SL Industries,* the court confronted the question "whether *any* intent to injure will render the resulting injury intentional [and preclude coverage], whether the wrongdoer must intend the *specific* injury that results, or whether there is some middle ground between the two approaches." *SL Industries, Inc. v. American Motorists Ins. Co.,* 607 A.2d at 1277 (emphasis in original). After evaluating alternative theories, the court adopted the "middle ground," which it summarized as follows:

> Assuming the wrongdoer subjectively intends or expects some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that

> injury. Lacking that intent, the injury was "accidental" and coverage will be provided.

Id. at 1278. *SL Industries* involved an allegation of intentional fraud that "presupposes a general subjective intent to injure." Accordingly the New Jersey Supreme Court remanded the cases for a determination of whether the injury suffered by the victim was improbable, and if so, whether the insured intended or expected the victim's actual injuries. *Id.* at 1279. The court noted this approach "conforms to an insured's objectively-reasonable expectations and provides the victim the greatest possibility of additional compensation consistent with the goal of deterring intentional wrongdoing." *Id.*

The New Jersey Supreme Court addressed the expected/intended clause of comprehensive general liability policies in the environmental pollution context in *Morton Intern., Inc. v. General Acc. Ins. Co.*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994). It attempted to apply the principles established in *Voorhees* and *SL Industries*, but was forced to "acknowledge the impracticality of adherence to the general rule that 'we will look to the insured's subjective intent to determine intent to injure.'" *Id.*, 629 A.2d at 879. The court then elaborated upon *Voorhees'* "exceptional circumstances" exception, which allows an intent to injure to be presumed without inquiry into the actor's subjective intent.

> [W]e hold that in environmental-coverage litigation a case-by-case analysis is required to determine whether, in the context of all the available evidence, "exceptional circumstances exist that objectively establish the insured's intent to injure." *Voorhees*, 607 A.2d at 1265. Those circumstances include the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of

> subjective knowledge concerning the possibility or likelihood of harm.

Id., 629 A.2d at 879-80. The court cautioned, "insureds held responsible for remediation of environmental pollution vary significantly in their degree of culpability for the harm caused by pollutant discharges." Therefore, "[a] general rule in environmental-pollution coverage litigation that would permit intent to injure to be presumed simply on the basis of a knowing discharge of pollutants would be unjustified." *Id.* at 879.

The New Jersey Supreme Court applied the factors it had outlined to determine whether "exceptional circumstances" supported the presumption of an intent to cause property damage. It noted Morton and predecessors had polluted Berry's Creek to such an extent that "[f]or a stretch of several thousand feet, the concentration of mercury ... [was] the highest found in fresh water sediments in the world." *Id.* at 834. This damage was caused by the discharge of pollutants from a mercury-processing plant over a period of at least eighteen, and perhaps as many as forty-five, years. *Id.* at 882. Moreover, for at least eighteen years the discharges had been intentional, even though the company knew they would cause environmental harm. Despite repeated complaints by regulatory agencies, Morton engaged in "a pattern of 'stonewalling' ... characterized by promises of compliance that consistently were unfulfilled." *Id.* On the basis of these facts, the court held, it "would have ignored reality to conclude that [Morton's] predecessors did not know that the mercury and its effluents was [sic] harmful to the land over which it coursed and the waters into which it fell." *Id.* at 884. Therefore, it held as a matter of law that the property damage was not caused by an "occurrence" within the meaning of the applicable insurance policies.

Morton's presumption of an insured's subjective intent to cause property damage from egregious circumstances does not hinge on whether the insured *should have* expected or intended to cause injury. This would be akin to a negligence standard. If negligent acts did not fall within the definition of

a covered occurrence, then there would be no point in purchasing comprehensive general liability insurance. *Pittston Co. v. Allianz Ins. Co.*, 905 F.Supp. 1279, 1301 (D.N.J.1995). While *Morton* pragmatically acknowledges courts should not "ignore reality" when exceptional circumstances establish the insured's subjective intent to injure, the insured's subjective intent to cause injury remains the relevant inquiry under the occurrence language.

In *Morton*, the New Jersey Supreme Court also addressed the applicability of *SL Industries'* improbability rule in environmental pollution coverage litigation. It explained:

> Turning to the question of whether environmental injury was intended or expected, we first observe that although the magnitude of damage to Berry's Creek and the surrounding areas may exceed any intention or expectation attributable to Morton's predecessors, we do not consider differences in harm relating to severity of environmental damage give rise to a finding of "improbability" of harm that invokes the need for evidence of subjective intent. *SL Industries, supra.* ... The holding of *SL Industries* was based on the Appellate Division's ruling ... that in a coverage action arising from a fight between two young teenagers in which one sustained a broken hip, a factual issue was presented because of the inherent improbability that the skirmish would result in a hip fracture. No such inherent "improbability" can be ascribed to the environmental damage attributable to Morton's predecessors.

Morton Intern., Inc. v. General Acc. Ins. Co., 629 A.2d at 882 (citations omitted). Therefore the court concluded it did not have to inquire into Morton's subjective intent to cause the specific environmental damage at issue.

In this case, the district court interpreted New Jersey law on the "expected/intended" clause before the New Jersey Supreme Court's decision in *Morton*. Nevertheless, it instructed

the jury to determine whether Chemical Leaman subjectively expected or intended to cause property damage at the Bridgeport site. At the end of trial, on the LMI's Rule 50(a) motion for judgement as a matter of law, the district court found that the harm to the environment caused by the Bridgeport water treatment system was improbable as a matter of law. The district court also held Chemical Leaman's actions were not so reprehensible as to justify the presumption of an intent to cause property damage under the "exceptional circumstances" exception. It concluded Chemical Leaman was not "throwing toxic waste out into the meadow-lands" as Morton and its predecessors had done; rather, it had "designed and built the facility to prevent [harm to the environment]." *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. at 1146.

[2, 3] On appeal, the LMI argue the district court's jury instructions on the expected/intended issue were erroneous and inconsistent with New Jersey law. They also assert the harm at the Bridgeport site was not improbable as a matter of law. Finally, they contend "exceptional circumstances" objectively establish Chemical Leaman's intent to cause property damage. Our review of jury instructions is plenary. *See Hook v. Ernst & Young*, 28 F.3d 366, 370 (3d Cir.1994). A jury charge, taken as a whole, must "fairly and adequately" submit the issues in the case to the jury. *Id.*

A. Jury Instruction on Expected/Intended

The district court instructed the jury that it should find for Chemical Leaman if Chemical Leaman did not subjectively expect or intend damage to the soil, groundwater, or wetlands at the Bridgeport site. Midway through the trial, the court instructed the jury:

> There are three kinds of damage at issue in this case — soil contamination, groundwater contamination, and swamp contamination ... You must evaluate Chemical Leaman by what you believe were its actual, subjective expectations or intentions with

regard to causing soil, groundwater and swamp damage ...

At the end of the trial, the district court again instructed the jury:

"EXPECTED OR INTENDED" — FOCUS ON DAMAGE

In determining Chemical Leaman's expectations and intentions in the context of basic coverage, you are instructed to focus on whether the specific property damage was expected or intended. You are not to consider whether the acts which caused that property damage were intentional acts. I give you this instruction because it is New Jersey law the unintended results of intentional acts may be covered by defendants' insurance policies. Thus, even though Chemical Leaman may have knowingly and intentionally committed the acts that ultimately led to the environmental damage at the Bridgeport site, there still may be insurance coverage as long as you find that Chemical Leaman did not expect or intend the specific property damage that is the subject matter of this litigation, namely the contamination of the soil, groundwater, or wetlands.

"EXPECTED OR INTENDED" — SPECIFIC DAMAGE STANDARD

I further instruct you that, in deciding whether Chemical Leaman subjectively expected or intended to cause property damage, you must consider whether Chemical Leaman subjectively expected or intended the very damage that is the subject matter of this case. Thus, it is not sufficient for you to find that Chemical Leaman expected or intended any injury — such as injury to the environment generally. Rather, you must determine whether Chemical Leaman expected or intended the actual property damage that it is now required to clean-up.

In addition, special interrogatories were submitted to the jury on Chemical Leaman's expectation and intention to cause damage to the soil, groundwater, and wetlands.

[4] The LMI contend the district court's final jury instruction was erroneous because it instructed the jury "to focus on whether the specific property damage" — namely contamination to the soil, groundwater, or wetlands — "was expected or intended." They argue the district should have instructed the jury that if Chemical Leaman "expected or intended" to cause some injury to the environment generally, then coverage was precluded unless the extent of the injury was improbable. The LMI rely on *SL Industries,* in which the New Jersey Supreme Court stated:

> Assuming the wrongdoer subjectively intends or expects some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was "accidental" and coverage will be provided.

SL Industries, Inc. v. American Motorists Ins. Co., 607 A.2d at 1278. The LMI contend Chemical Leaman intended to cause some injury because Chemical Leaman knew the rinsewater contained contaminants, and knew the contaminants would seep into the soil when deposited in the containment ponds. They assert Chemical Leaman also knew discharges from the overflow pipe would drain into the swamp. Therefore, they argue, Chemical Leaman intended "some sort of injury" as a matter of law, and coverage was precluded unless the extent of injury was improbable.

Although the LMI's argument possesses a certain appeal, we believe the New Jersey Supreme Court would reject it. An insured who intentionally discharges a known pollutant generally intends "some sort of harm," however *de minimis,* and the harm that actually results is usually a probable result of the discharge. Accordingly, the LMI's reading of *SL Industries* would result in a general rule precluding coverage based on the knowing discharge of a pollutant. But in *Morton Intern., Inc. v. General Acc. Ins. Co.,* 629 A.2d at 879-80, the

New Jersey Supreme Court held "a general rule ... [precluding coverage] simply on the basis of a knowing discharge of pollutants would be unjustified." The LMI's reading of *SL Industries'* "some sort of injury" language conflicts with *Morton.*

Moreover, in *SL Industries,* the New Jersey Supreme Court confronted the problem of insurance coverage for injury caused by intentional, tortious conduct, namely intentional fraud. But intentional tort cases are an imperfect analogy in the context of environmental pollution. The insured who commits an intentional tort like fraud possesses some knowledge of the nature of the harm likely to result and intends to cause such harm. Also, most intentional torts are committed in a single, discrete, and temporally limited incident. In the context of environmental pollution, the insured's knowledge concerning the harmful propensities of pollutants and the likelihood of harm to the environment may be less complete and may vary significantly over time. For example, it is a matter of historical fact that many insureds, acting in accordance with standard industry practices, intentionally discharged pollutants into unlined containment ponds or other inadequate waste treatment systems, but were unaware that groundwater damage would eventually result.

In *Morton,* the New Jersey Supreme Court acknowledged the unsuitability of prior case law on the expected/intended provision in environmental pollution coverage litigation. *Morton,* 629 A.2d at 879 ("In applying our holding in *Voorhees* to claims seeking coverage for property-damage caused by environmental pollution under occurrence-based CGL policies, we acknowledge the impracticality of adherence to the general rule that 'we will look to the insured's subjective intent to determine intent to injure.'"). We believe the New Jersey Supreme Court would similarly reject a wooden application of *SL Industries'* "some sort of injury" language, and would instead look to the general principles underlying the interpretation of insurance-policy provisions involving intentional conduct. As stated by the New Jersey Supreme Court:

> Our goal is to interpret the insurance provisions in light of the insured's objectively reasonable expectations.... [W]e must attempt to reconcile two goals: that of deterring intentional wrongdoing by precluding insurance indemnification, and that of providing victims with compensation to the extent that compensation will not interfere with deterring injurious behavior.

SL Industries, Inc. v. American Motorists Ins. Co., 607 A.2d at 1278. We will apply these principles in this case.

[5, 6] In the environmental pollution context, the insured's appreciation of the magnitude and nature of harm likely to be caused by a discharge of pollutants is relevant in determining whether insurance coverage should be precluded.

> When the injury caused significantly exceeds the injury intended or expected ... then it is hard to characterize the injury as truly "intentional." ... Moreover, if the tortfeasor did not intend or expect to cause the resulting harm, denying coverage will not deter the harmful conduct. In that case, there is no policy justification for denying the victim the possibility of additional compensation.

SL Industries, Inc. v. American Motorists Ins. Co., 607 A.2d at 1278. If an insured does not understand the causal connection between the discharge of a pollutant and the property damage that results, deterrence is not served by precluding insurance coverage. Moreover, where an insured does not intend or expect property damage of a particular nature to result from its discharge of pollutants, the insured has an "objectively reasonable expectation" of coverage should such property damage later manifest itself. For these reasons, we cannot agree with the LMI's contention that some intent to cause any sort of environmental harm will preclude insurance coverage for all environmental harm under New Jersey law. Rather we believe the New Jersey Supreme Court would inquire into the insured's intent or expectation to cause environmental harm of a particular sort, for example, whether the

insured intended damage to the soil, groundwater, or wetlands. Where the insured intends or expects such harm, coverage is precluded, unless, of course, the injury was improbable. On the other hand, an insured's intent to cause environmental harm of one sort will not preclude coverage for other kinds of unintended and unexpected environmental harm. For example, an insured's intent to cause soil damage will not preclude coverage for unintended and unexpected damage to the groundwater or wetlands.

The district court's jury instruction fairly and adequately asked the jury to consider whether Chemical Leaman expected or intended injury to the soil, groundwater, or wetlands. The instruction also allowed the jury to consider the nature and extent of Chemical Leaman's knowledge regarding the likelihood of harm as that knowledge evolved over time. There was ample evidence supporting the jury's conclusion that Chemical Leaman did not expect or intend to cause property damage. Chemical Leaman presented evidence that it believed the system of unlined ponds would cleanse contaminated rinsewater. Although Chemical Leaman intentionally discharged known pollutants, a reasonable jury could find, and the jury here did find, Chemical Leaman did not expect or intend damage to the soil, groundwater or wetlands. In light of the jury's findings, Chemical Leaman is entitled to insurance coverage for the costs of clean-up of environmental damage. Because Chemical Leaman did not expect or intend damage to the soil, groundwater, or wetlands, we need not inquire whether the property damage at the Bridgeport site was an improbable result of Chemical Leaman's actions.

B. The "Exceptional Circumstances" Exception

[7] The LMI contend that under *Voorhees'* "exceptional circumstances" exception, Chemical Leaman's intent to cause property damage should be presumed as a matter of law. As we have noted, in *Morton* the New Jersey Supreme Court set forth several factors to be considered in evaluating whether exceptional circumstances exist. These include:

> the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.

Morton Intern., Inc. v. General Acc. Ins. Co., 629 A.2d at 879-80. We believe the New Jersey Supreme Court designed the "exceptional circumstances" exception to apply only to egregious conduct. This much is apparent from the court's use of child sexual abuse as an illustration of conduct that is "so inherently injurious" as to warrant a presumption of intent to injure. *Id.* at 879. Because "insureds held responsible for remediation of environmental pollution vary significantly in their degree of culpability for the harm caused by pollutant discharges," we believe "[a] general rule in environmental-pollution coverage litigation that would permit intent to injure to be presumed simply on the basis of a knowing discharge of pollutants would be unjustified." *Id.* at 879-880.[7]

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[7] The dissent would apply the "exceptional circumstances" test in all environmental pollution insurance coverage cases. *See Dissent* at 1004 ("The 'exceptional circumstances' test, however, is not an 'exception,' but the rule that is to be applied in environmental coverage cases."). It would have the court, rather than the jury, decide whether an insured "expected" or "intended" to cause property damage.

We believe *Morton* did not displace the usual relationship between the court and the jury. It remains the unique province of the jury to resolve disputed issues of fact — such as the intentions or expectations of the insured. Only in cases where there is no legally sufficient evidentiary basis for a reasonable jury to find for a party may the court enter judgment as a matter of law. *Morton* refines the test for when a court may enter judgment as a matter of law in environmental pollution coverage cases. Its "exceptional circumstances" define when no reasonable jury could find the insured did not intend or expect to cause property damage because objective circumstances — evidence of prolonged, intentional, or flagrant discharges of known pollutants in the face of regulatory disapproval —

(Footnote continued)

Instead *Morton* mandates "a case-by-case analysis ... in order to determine whether, in the context of all the available evidence, exceptional circumstances exist." *Id. Morton* is instructive in considering the level of culpability required to allow intent to injure to be presumed in the environmental context. In *Morton,* the insured intentionally discharged mercury-laden compounds directly into streams over a lengthy period of time. The Department of Health and state engineers made repeated demands for compliance and the insured consistently disregarded its own promises to remediate the discharge. *Morton,* 629 A.2d at 882. "[T]he record fairly reflect[ed] a pattern of 'stonewalling' on the part of [the insured], characterized by promises of compliance that consistently were unfulfilled." *Id.*

We believe a reasonable jury could find Chemical Leaman did not engage in a "pattern of stonewalling." On the contrary, a jury could conclude that Chemical Leaman's behavior suggests a good faith effort at compliance with agency demands. Chemical Leaman initially designed the Bridgeport wastewater treatment system to purify contaminated rinseate in 1960. The designers of the system believed that the sandy bottom of the unlined ponds would purify the contaminated rinsewater by acting as a natural filter, and the overflow pipe was intended as a safety valve to prevent a rupture in the berms of the containment ponds in the event of heavy rain. When an inspector from the Pollution Unit of the New Jersey Division of Fish, Game & Wildlife advised Chemical Leaman of an unsatisfactory discharge into a neighboring swamp in September 1961, Chemical Leaman responded by constructing a second set of lagoons and the final settling lagoon. Seven years later, water pollution inspectors from the New Jersey Department of Health concluded discharges from the lagoon were pollutional and, in February 1969, ordered Chemical

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establish that the insured must have intended property damage. The presence of "exceptional circumstances" requires a court to enter judgment as a matter of law. Their absence, of course, does not prevent a jury from finding an insured "expected" or "intended" to cause property damage.

Leaman to submit plans for a system to properly treat the effluent. In May 1969, Chemical Leaman submitted a plan for a new rinsewater treatment system. The New Jersey Department of Health rejected this plan and over the next four years the parties attempted to resolve their dispute until January 1974, when they entered into a consent judgment. This history can hardly be described as "a pattern of 'stonewalling' ... characterized by promises of compliance that consistently were unfulfilled." *Morton,* 629 A.2d at 882. Accordingly, "exceptional circumstances" do not exist here that would permit a presumption of Chemical Leaman's subjective intent to cause property damage.

IV. Pollution Exclusion Clauses

The April 1, 1971 to April 1, 1985 LMI policies contained pollution exclusion clauses barring coverage for discharges of pollutants, unless such discharges were "sudden and accidental" or "sudden, unintended, and unexpected."[8] The LMI

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[8] The policies sold by the LMI to Chemical Leaman covering the April 1, 1974 to April 1, 1977 period contained the standard ISO pollution exclusion clause, which provides:

> This insurance does not apply to ... Property Damage arising out of the Discharge, Dispersal, Release or Escape of ... Contaminants or Pollutants into or upon Land, the Atmosphere or any Watercourse or Body of Water, but this exclusion does not apply if such Discharge, Dispersal, Release or Escape is sudden and accidental.

The April 1, 1971 to April 1, 1974 and the April 1, 1977 to April 1, 1985 policies contained the NMA 1685 pollution exclusion, which provides:

> This Insurance does not cover any liability for: (1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution, or contamination, provided always that this Paragraph (1) shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed where such seepage, pollution, or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

(Footnote continued)

argued to the district court that coverage was precluded because the discharge of pollutants at the Bridgeport site was not "sudden." The district court rejected the LMI's argument, relying on a line of New Jersey cases beginning with *Broadwell Realty Serv., Inc. v. Fidelity & Cas. Co.*, 218 N.J.Super. 516, 528 A.2d 76 (App.Div.1987). It held the word "sudden" is ambiguous — sometimes carrying a temporal meaning and sometimes meaning "unexpected" — and should not be interpreted to exclude coverage for environmental harm caused by gradual discharges over a prolonged period. It concluded, "[t]he pollution exclusion precludes coverage when the insured has caused the discharge of pollutants, unless the discharge was neither expected nor intended from the standpoint of the insured." *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. at 1157. The district court then granted partial summary judgment to the insurers with respect to soil damage because Chemical Leaman intended to discharge contaminants into the soil. At trial, the jury found Chemical Leaman expected and intended discharges to the swamp, but not to the groundwater. On appeal, the LMI contest their liability for groundwater damage.

Subsequent to the district court's decision, the New Jersey Supreme Court addressed the standard form pollution exclusion clause in *Morton Intern., Inc. v. General Acc. Ins. Co.*, 629 A.2d at 847-76. The New Jersey Supreme Court expressly overruled *Broadwell,* because it believed that the word "sudden" was not ambiguous. It held "'sudden' possesses a temporal element, generally connoting an event that begins abruptly or without prior notice or warning," and concluded that "the phrase 'sudden and accidental' in the standard

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The district court held both pollution exclusions were identical in scope. It interpreted "accidental" to mean unintended and unexpected, and therefore concluded that the "sudden, unintended, and unexpected" exception in the NMA 1685 exclusion should be construed in the same manner as the "sudden and accidental" exception in the standard ISO pollution exclusion. *See Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. at 1156 n. 17. In any case, the dispute in this case revolves around application of the term "sudden," which appears in both clauses.

pollution-exclusion clause describes only those discharges, dispersals, releases, and escapes of pollutants that occur abruptly or unexpectedly and are unintended." *Id.*, at 847. Nevertheless, the court refused to enforce the standard pollution exclusion as written because it found the insurance industry had misled state regulators in securing its approval. Instead, the court held the pollution exclusion clause precludes coverage if the insured intentionally discharges a known pollutant, regardless of whether the insured expected or intended to cause property damage:

> [W]e perceive that regulators would reasonably have understood the effect of the clause to have denied coverage for the intentional discharge, dispersal, release, or escape of known pollutants, whether or not the eventual damage was intended or expected from the standpoint of the insured. The industry's presentation of the clause to regulators described it as a clarification of the "intended and expected" clause of the basic "occurrence" definition "so as to avoid any question of intent," and could fairly be understood as an attempt to override the issue whether damage was intended by excluding coverage for intentional discharges of known pollutants. Accordingly, we construe and give effect to the standard pollution-exclusion clause only to the extent that it shall preclude coverage for pollution-caused property damage caused by an "occurrence" if the *insured* intentionally discharged, dispersed, released, or caused the escape of a known pollutant.

Id. at 848 (emphasis in the original).

On appeal, the LMI contend the district court incorrectly instructed the jury that the pollution exclusion clause precludes coverage only if Chemical Leaman intentionally discharged known pollutants into the groundwater. First, the LMI argue *Morton* established that the word "sudden" has a temporal connotation — meaning "abrupt" — and precludes

coverage for gradual discharges, dispersals, releases, or escapes. Because Chemical Leaman discharged contaminated rinsewater over a prolonged period, they argue, coverage should be precluded. The LMI acknowledge *Morton's* regulatory estoppel holding generally prevents enforcement of the "sudden" requirement, but assert *Morton* does not apply to the LMI because (1) several of their policies contain the non-standard NMA 1685 pollution exclusion, and (2), they were not party to the misrepresentations made to regulatory authorities. Second, the LMI argue that even if *Morton's* regulatory estoppel holding applies, the pollution exclusion clause bars coverage because Chemical Leaman intentionally discharged known pollutants. They argue the district court erred in requiring proof that Chemical Leaman intended discharge *into* the groundwater, as opposed to into the environment generally.

A. Regulatory Estoppel

1. Non-Standard Pollution Exclusion

[8] In *Morton,* the New Jersey Supreme Court applied regulatory estoppel to the ISO standard pollution exclusion clause and did not address coverage issues relating to non-standard pollution exclusion clauses. *Morton Intern., Inc. v. General Acc. Ins. Co.,* 629 A.2d at 881. The LMI argue that *Morton's* regulatory estoppel holding should not prevent enforcement of the term "sudden" in the non-standard NMA 1685 pollution exclusion clause contained in certain of their policies. We believe this argument lacks merit. Both the ISO standard pollution exclusion and the non-standard NMA 1685 pollution exclusion use the term "sudden." The NMA 1685 exclusion closely tracks the language of the standard pollution exclusion, and both pollution exclusion clauses came into use at about the same time. Indeed, the LMI argue the NMA 1685 exclusion and the standard exclusion are identical in scope because both exclude coverage for non-abrupt, non-sudden discharges and releases of pollutants. *See also Potomac Elec. Power Co. v. California Union Ins. Co.,* 777 F.Supp. 968, 978 n. 23 (D.D.C.1991) (defendant insurers admit there is "no

material difference" between standard pollution exclusion and NMA 1685 pollution exclusion). The New Jersey Supreme Court refused to enforce the term "sudden" in *Morton* because the insurance industry mislead state regulators as to its effect when obtaining approval for the standard pollution exclusion clause. We do not believe the New Jersey Supreme Court would enforce the term "sudden" in non-standard pollution exclusion clauses simply because other language in those clauses varies slightly from that in the standard pollution exclusion. Therefore we conclude that *Morton's* regulatory estoppel holding applies to the NMA 1685 pollution exclusion as well as the standard pollution exclusion.

2. Application of Regulatory Estoppel to the LMI

The LMI also argue that *Morton's* regulatory estoppel holding should not be applied to them because they did not affirmatively deceive New Jersey regulators in securing approval of the standard pollution exclusion. We cannot agree. The LMI's policies contained the standard pollution exclusion precluding coverage for non-sudden discharges or releases of pollutants. They also contained the NMA 1685 pollution exclusion, which closely parallels the language of the standard exclusion. Approval of the standard pollution exclusion clause was secured through misrepresentations to regulatory authorities. Regardless of whether the LMI themselves directly misrepresented the effect of the term "sudden" in the pollution exclusion clauses, they benefitted from the misleading explanation of the effect of the standard pollution exclusion submitted to state regulators by insurance industry trade groups. The LMI did not independently submit information to New Jersey regulators or attempt to explain the full impact of the term "sudden" in the pollution exclusion clauses they used.[9] Under these circumstances, we believe the New Jersey

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[9] In *Morton,* the New Jersey Supreme Court noted the failure of the insurance industry to reduce rates on comprehensive general liability insurance policies containing pollution exclusion clauses, even though such policies dramatically reduced coverage previously offered for property damage caused by pollution. *See Morton Intern., Inc. v. General Acc. Ins. Co.*, 629

(Footnote continued)

Supreme Court would not enforce the term "sudden" in the policies issued by the LMI.

B. Intentional Discharge

The LMI also argue the district court should not have required separate findings with regard to intent to discharge into the soil, wetlands, and groundwater. They contend that if Chemical Leaman intended any discharge, whether to the soil, groundwater, or wetlands, then the pollution exclusion clauses preclude coverage for all property damage arising from that discharge. Because the district court granted partial summary judgment to the insurers with respect to discharges into the soil, the LMI argue, the district court should also have denied coverage for all resulting property damage, including groundwater damage. The effect of the LMI's argument would be to require judgment in their favor as a matter of law on all policies containing a pollution exclusion. The LMI raised this argument before the district court in a Rule 50(b) motion. The district court refused to consider the argument because the LMI had not raised it in their prior Rule 50(a) motion. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, No. 89-1543, slip op. at 4 (D.N.J. November 8, 1993).

[9] Motions for judgment as a matter of law must be made before submission of the case to the jury and must "specify the judgment sought and the law and facts on which the moving party is entitled to judgment" under Fed.R.Civ.P. 50(a)(2).[10] We have reviewed the portions of the record cited

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A.2d at 872. Chemical Leaman contends that the LMI did not reduce the rates they charged on policies containing pollution exclusion clauses. This factor would support applying *Morton's* regulatory estoppel rule to the LMI, although we do not rely on it in reaching our holding.

[10] Fed.R.Civ.P. 50(a) provides:

(a) **Judgment as a Matter of Law**

(1) If during a trial by a jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to

(Footnote continued)

to by the LMI in their brief, and conclude that the LMI did not specify the "law and facts" entitling them to judgment in their summary judgment motion, their Joint Trial Brief, or their Rule 50(a) motion before the district court. The LMI assert they adequately raised the argument because they objected to the district court's jury instruction on the pollution exclusion clauses, stating:

> There was one other thing with respect to the pollution exclusion. Just to be perfectly clear. It's not my understanding that the law even where it does not recognize a temporal element for the sudden. It is not required that there be an intent or an expectation to discharge a particular medium, rather it's the discharge itself and where it goes. This should not be the subject of the deliberation of the jury.

An objection to a jury charge can serve as a predicate for a later Rule 50(b) motion only if the district court explicitly treated the objection as a Rule 50(a) motion. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814-15 (3d Cir.1984) ("A request for jury instructions may suffice to fulfill the requirement that a motion for a directed verdict be made before granting a JNOV only if it is clear the district court treated the request as a motion for a directed verdict and ruled on it as such."), *cert. denied*, 477 U.S. 908, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986); *Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken*, 536 F.2d 9, 11 (3d Cir.) (same), *cert. denied*, 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976). The district court did not treat the LMI's objection to the jury

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find for that party on the issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and facts on which the moving party is entitled to judgment.

charge as a Rule 50(a) motion. Accordingly, we believe the district court correctly declined to hear the LMI's argument on their Rule 50(b) motion.

"It is clear under our jurisprudence that this court cannot reverse the district court's decision denying [a] Rule 50(b) motion for j.n.o.v. on the basis of an argument the [a party] failed to raise in support of its predicate Rule 50(a) motion for a directed verdict." *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1077 (3d Cir.1991), *cert. denied,* 503 U.S. 985, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992); *see also Lightning Lube, Inc. v. Witco. Corp.,* 4 F.3d 1153, 1172 (3d Cir.1993) ("In order to preserve an issue for judgment pursuant to Rule 50(b), the moving party must timely move for judgement as a matter of law at the close of the nonmovant's case, pursuant to Rule 50(a), and specify the grounds for that motion."). The LMI did not raise their argument in their Rule 50(a) motion. Therefore we will not address it on appeal.

[10] We believe the LMI's objection to the district court's jury instruction was also insufficient to preserve their argument for appeal under Fed.R.Civ.P. 51. In order to preserve an objection to a jury instruction, a party must "object[ ] thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. The purpose of Rule 51 is to "afford the trial judge an opportunity to correct the error in her charge before the jury retires to consider its verdict and to lessen the burden on appellate courts by diminishing the number of rulings at the trial which they may be called on to review." *Dunn v. HOVIC,* 1 F.3d 1371, 1379 (3d Cir.) (in banc), *modified,* 13 F.3d 58, *and cert. denied,* 510 U.S. 1031, 114 S.Ct. 650, 126 L.Ed.2d 608 (1993). We believe the LMI's objection did not identify the issue they now argue on appeal with sufficient clarity to give the trial judge notice of a possible error in the instruction. Not only was the objection difficult to understand because of its convoluted grammar, but the objection did not specify the authority upon which it was based. Therefore the LMI's objection failed to comply with Rule 51's requirement that an objection "stat[e] distinctly ... the grounds of the

objection" and did not preserve the LMI's argument for appeal. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.), ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace."), *cert. denied,* 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

[11–13] "In the absence of a party's preservation of an assigned error for appeal, we review for plain error, and our power to reverse is discretionary." *Fashauer v. New Jersey Transit Rail Operations, Inc.,* 57 F.3d 1269, 1289 (3d Cir.1995). Particularly in the civil context, we exercise our power to reverse for plain error sparingly. *Id.; see also United States v. Carson,* 52 F.3d 1173, 1188 (2d Cir.1995) ("plain error review is only appropriate in the civil context where the error is so serious and flagrant that it goes to the very integrity of the trial."), *cert. denied,* —— U.S. ——, 116 S.Ct. 934, 133 L.Ed.2d 861 (1996). Because we do not believe any mistake in the district court's jury instructions on the pollution exclusion clause was so fundamental as to amount to plain error, we decline to exercise our discretion to reverse.

V. Other-Site Evidence

[14] Before trial, Chemical Leaman made a motion *in limine* to exclude evidence relating to environmental problems at other tank truck cleaning facilities it operated. The district court granted this motion under Federal Rule of Evidence 403 because it found the probative value of the evidence substantially outweighed by the danger of unfair prejudice, jury confusion, and undue waste of time. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.,* No. 89-1543, slip op. at 4-5 (D.N.J. March 17, 1993).

The LMI argue the district court abused it discretion in excluding evidence of environmental pollution at other Chemical Leaman cleaning facilities. They contend the evidence from other sites tended to establish Chemical Leaman knew its system of unlined ponds at Bridgeport would cause property damage, including harm to the groundwater. They also insist that such evidence should have been allowed to

impeach the testimony of Harry Elston, the designer of all Chemical Leaman's waste treatment facilities, even if not allowed in their case-in-chief. We review the district court's rulings on the admissibility of evidence for an abuse of discretion. *See Tait v. Armor Elevator Co.*, 958 F.2d 563, 568 (3d Cir.1992).

The district court noted the evidence the LMI sought to introduce had limited probative value because its relevance depended upon an extended chain of reasoning linking it to the Bridgeport site:

> the jury would have to evaluate the various explanations offered by Chemical Leaman on why its knowledge of alleged problems at other sites did not translate into an expectation or intention that the rinsewater treatment system in Bridgeport would cause damage. These explanations include, among others, whether damage actually occurred at the other sites; and whether the geological and other conditions at the other sites were significantly different or substantially the same as at Bridgeport.... [T]he probative value of the proffered other site evidence is remote because it necessarily depends upon these intermediate findings.

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., No. 89-1543, slip op. at 4-5 (D.N.J. March 17, 1993). The district court believed that for the jury properly to evaluate this evidence, a series of mini-trials relating to each site would have been required. Such mini-trials, the court concluded, would cause undue delay and mislead and confuse the jury as to the ultimate factual issue, namely Chemical Leaman's subjective intent to cause harm at the Bridgeport site. *Id.* Moreover, the district court held that the other site evidence carried with it a significant danger of unfair prejudice. On the basis of such evidence, the court noted, the jury might have ignored New Jersey law on the insured's subjective intent and applied an objective test assessing whether

"Chemical Leaman should have known that its rinsewater treatment system would cause damage." *Id.*

In light of the district court's balancing of the probative value of the proffered evidence against its prejudicial effect and the potential for jury confusion and delay, we cannot say the district court abused its discretion in excluding the other site evidence.

VI. Continuous Trigger

The New Jersey Supreme Court adopted the "continuous trigger" theory to identify the time of an "occurrence" in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974 (1994). The continuous trigger theory recognizes that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy." *Id.*, 650 A.2d at 995.

> The conceptual underpinning of the continuous-trigger theory, then, is that injury occurs during each phase of environmental contamination — exposure, exposure in residence (defined as further progression of environmental injury even after exposure has ceased), and manifestation of disease.

Id. at 981.

In *Owens-Illinois*, the New Jersey Supreme Court also addressed the allocation of losses between multiple insurers and the insured when the continuous trigger theory establishes an occurrence in several different policy years. It held "[a] fair method of allocation appears to be one that is related both to the time on the risk and the risk assumed," *id.* at 995, "*i.e.*, proration on the basis of policy limits, multiplied by years of coverage," *id.* at 993.

[15] *Owens-Illinois* involved a suit for personal injuries resulting from exposure to asbestos, but the New Jersey Supreme Court made clear the continuous trigger theory extends

to property damage claims resulting from long-term environmental contamination. It concluded, "[p]roperty-damage cases are analogous to the contraction of disease from exposure to toxic substances like asbestos. Like a person exposed to toxic elements, the environment does not necessarily display the harmful effects until long after the initial exposure." *Id.* at 983; *see also Astro Pak Corp. v. Fireman's Fund Ins. Co.*, 284 N.J.Super. 491, 665 A.2d 1113, 1117 (App.Div.) (same), *certif. denied*, 143 N.J. 323, 670 A.2d 1065 (1995).

Although considering the issue before the New Jersey Supreme Court's decision in *Owens-Illinois*, the district court applied the continuous trigger theory, ruling all of the LMI's policies from 1960 through 1985 had been triggered by the environmental contamination at the Bridgeport site, unless a policy exclusion barred coverage. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. at 1153-54. The district court also held that all insurance policies activated by a continuing occurrence are jointly and severally liable to policy limits for property damage resulting from the occurrence. *Id.*

[16] On appeal, the LMI contend the New Jersey Supreme Court would not recognize the continuous-trigger theory. In light of the intervening decision in *Owens-Illinois*, this argument is meritless. On the other hand, the LMI correctly dispute the district court's holding that all policies are jointly and severally liable under the continuous trigger theory. Because the New Jersey Supreme Court rejected joint and several liability in favor of a risk-based allocation of liability among applicable insurance policies in *Owens-Illinois*, we will remand this matter to the district court for a reallocation of liability between the insurers and among the triggered policies in accordance with *Owens-Illinois*.

[17, 18] The LMI also contend that Chemical Leaman failed to prove property damage occurred during each policy year from 1960-70, and therefore the district court erred in finding as a matter of law that property damage occurred in the 1960-61 policy year, and in denying their summary

judgement motion with respect to the 1961-70 policy years. Under the continuous trigger theory, exposure to the harm causing agent is sufficient to trigger potential coverage. Actual manifestation of the injury is not required, so long as there is a continuous, indivisible process resulting in damage. *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d at 981 ("injury occurs during each phase of environmental contamination — exposure, exposure in residence ... and manifestation of disease"); *Morrone v. Harleysville Mut. Ins.*, 283 N.J.Super. 411, 662 A.2d 562, 564 (App.Div.1995) (exposure to gasoline sufficient to trigger occurrence). It is undisputed that Chemical Leaman discharged contaminated rinsewater into the unlined ponds and lagoons in every year from 1960-70. Moreover, the district court found as a factual matter that "contaminated rinsewater from the three settling ponds started migrating through the soil to underlying groundwater almost immediately after beginning pond operation in 1960." *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. at 1148. Accordingly, the district court correctly concluded as a matter of law that property damage occurred upon initial exposure in 1960, and should have concluded as a matter of law that property damage occurred in each policy period from 1961-70. The LMI, of course, were not prejudiced by the district court's error.

[19] Finally, the LMI assert the district court incorrectly instructed the jury on the meaning of "property damage" in the underlying policies. Specifically, they object to the instruction that "Chemical Leaman may be entitled to coverage under the defendants' insurance policies for property damage that occurs during a policy period, but that originally began during an earlier policy period." They argue Chemical Leaman was required to prove "actual injury" during each policy period, and the jury incorrectly equated exposure to pollutants with property damage. Under the continuous trigger theory, proof of actual injury in the sense of manifestation of injury is not required. The jury could find property damage occurred during a policy period so long as there is proof that a continuous, indivisible process of injury occurred during that period. The district court's jury charge was not erroneous.

VII. Late Notice

[20] Chemical Leaman failed notify its insurers of its claim relating to the Bridgeport facility until 1988, four years after it entered into a consent decree with the EPA admitting liability under CERCLA, and even longer after the underlying events that harmed the environment. The LMI assert this failure violated the notice provisions of the policies and relieves them from any obligation to provide insurance coverage.

An insurer that seeks to disclaim coverage based upon untimely notice from its insured under an occurrence-based policy must demonstrate that it has suffered "appreciable prejudice." *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 237 A.2d 870 (1968); *Med. Inter Ins. Exchange v. Health Care Ins. Exchange*, 278 N.J.Super. 513, 651 A.2d 1029, 1033 (App.Div.), *certif. denied*, 140 N.J. 329, 658 A.2d 728 (1995). Lower courts in New Jersey have identified two relevant factors in determining whether an insurer has suffered prejudice justifying a denial of coverage: "whether substantial rights have been irretrievably lost by virtue of the failure of the insured to notify the carrier in a timely fashion," *Morales v. National Grange Mut. Ins. Co.*, 176 N.J.Super. 347, 423 A.2d 325, 329 (Law Div.1980), and whether "the likelihood of success of the insurer in defending against the [underlying claim]" has been adversely affected, *id.*, 423 A.2d at 330. Applying this two part test, the district court found the LMI had suffered no prejudice because material evidence had not been irretrievably lost, and no meritorious defense existed to Chemical Leaman's underlying liability under CERCLA. *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F.Supp. 1136, 1158-59 (D.N.J.1993).

[21] The LMI contend the district court erred in holding Chemical Leaman's contractual obligation to notify it of claims arose, at the earliest, in 1984. They argue that obligation arose as much as twenty years earlier, when Chemical Leaman received complaints of environmental pollution from various regulatory bodies. We disagree. Chemical Leaman could not have known of the liabilities for which it seeks

coverage until the EPA placed the Bridgeport site on the Superfund National Priorities List in 1984. Prior New Jersey state actions against Chemical Leaman had sought only non-monetary injunctive relief. Because 1984 was the earliest practicable date by which Chemical Leaman could have given notice to the LMI, the LMI's assertions that potential valuable evidence was lost prior to 1984 are irrelevant. While the LMI also argue that evidence was lost, and witnesses died, between 1984 and 1988, they have not disputed that "a wealth of relevant documentary evidence remains intact." *Id.* at 1159. Moreover, the LMI had extensive opportunities to depose, and later cross-examine, Harry Elston, the designer of the Bridgeport site. Accordingly, the district court correctly found that the LMI had not irretrievably lost any substantial right due to Chemical Leaman's untimely notice.

In addition, the LMI assert that Chemical Leaman's failure to give timely notice adversely affected their ability to defend against the underlying claim. But the district court held no prejudice had resulted:

> Chemical Leaman, as owner and operator of the Bridgeport facility, is strictly liable under CERCLA for damages for injury to, destruction of, or loss of natural resources, as well as for the reasonable costs of assessing such damage to natural resources, and all costs of removal, remediation, or other necessary response costs. Chemical Leaman's liability for these damages is retroactive, joint, and several, and imposed regardless of fault. Defendants do not contend that a meritorious challenge exists to the findings, made in the 1985 consent order.... Nor do defendants assert there is a meritorious defense to the EPA's allegation that the presence of hazardous substances at the Bridgeport facility and their migration to surrounding soils and groundwater constitute a release within the meaning of section 101(22) of CERCLA, 42 U.S.C. § 9601(22). Accordingly, the court finds that defendants have not shown a

> likelihood of success in defending Chemical Leaman against claims under CERCLA.
>
> Defendants also ask this court to find that timely notice would have resulted in a likelihood that the insurance carriers would have reached a more favorable settlement. However, defendants fail to demonstrate what better arrangement the insurance carriers would have been able to obtain if they had assumed Chemical Leaman's defense upon timely notice.

Id. On appeal, the LMI have not advanced any arguments that cause us to doubt the district court's conclusion.

Finally, the LMI question whether the New Jersey Supreme Court would apply the two part *Morales* test in determining whether an insurer has suffered appreciable prejudice. But the LMI have not directed us to any New Jersey precedent that questions the vitality of *Morales.* Accordingly, their contention lacks merit.

VIII. Discovery Misconduct

The LMI assert that Chemical Leaman willfully suppressed the identity of relevant witnesses and failed to produce certain documents. After trial, the LMI moved for relief from the judgment and a new trial under Federal Rule of Civil Procedure 60(b)(3). The district court denied the motion, although it believed a "close question" had been presented. After reviewing the record and the arguments of the parties, we conclude the district court did not abuse its discretion in denying the LMI's motion.

IX. Conclusion

For the foregoing reasons, we will affirm the district court except as to the allocation of liability among applicable policies. We will remand to the district court for a reallocation of damages among applicable policies in accordance with the New Jersey Supreme Court's holding in *Owens-Illinois,* 650 A.2d at 993-95.

McKEE, Circuit Judge, concurring in part, and dissenting in part.

I must respectfully dissent from part III of the majority opinion because I do not agree with the majority's interpretation of *Morton International, Inc. v. General Accident Ins. Co. of America* 134 N.J. 1, 629 A.2d 831 (1993), *cert denied,* —— U.S. ——, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994). I believe *Morton* mandates an objective inquiry in disputes such as this. Because the district court's jury instruction improperly focused on Chemical Leaman's subjective intent, I would remand this matter to the district court for retrial to determine if "exceptional circumstances" objectively established Chemical Leaman's intent to cause injury, and if so, whether the extent of the resulting injury was foreseeable.

I. *The Evolution of The "Intent" Analysis in "Occurrence-Based" Policies*

Although the majority's analysis has much to commend it, I believe that a more thorough discussion of the evolution of New Jersey's law in this area is necessary to fully understand *Morton.* An appreciation of the development of that law casts a different light upon the portions of *Morton* that control our analysis.

A. Atlantic Employers Ins. Co. v. Tots & Toddlers Pre School Day Care Center, Inc.[1]

Our analysis must begin with, and be guided by a discussion of *Atlantic Employers,* because it used language that the court would later cite and which I believe has caused my colleagues to take an incorrect analytical turn. In *Atlantic Employers,* parents of children who had been sexually abused sued the owners and operators of a day care center where the abuse purportedly took place. The company that insured the center then brought a declaratory judgment action to

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[1] 239 N.J.Super. 276, 571 A.2d 300 (App.Div.), *cert. denied,* 122 N.J. 147, 584 A.2d 218 (1990).

determine its obligation to defend or indemnify the owners for any recovery the plaintiffs might win in their personal injury suits based upon negligence and intentional tort.

The day care center's insurance policy insured against damage resulting from an "occurrence." An "occurrence" included injury or damage that was "neither expected nor intended by the insured." *Atlantic Employers,* 571 A.2d at 303. The policy also contained an exclusion for violations of penal statutes or ordinances. The Appellate Division first noted the general rule that "coverage does exist ... 'for the unintended results of an intentional act, but not for damages assessed because of an injury intended to be inflicted.'" *Id.* (citation omitted). The court stated:

> There seems to be no dispute that if ... Robert Knighton sexually molested the children, then he had the requisite level of intent to be found guilty of sexual molestation, based on the criminal statutes of this State. But appellants insist that this does not necessarily mean that he intended the damages or injuries incurred by the children as a result of such actions.... Further, they insist that the existence of such intent cannot automatically be imputed to the other insureds under the policy so as to exclude coverage.... We reject this position.

Id. The court then examined cases from other jurisdictions in order to analyze the insureds' argument in context with developing law. The court noted that some jurisdictions employed a subjective test in determining insurance coverage under these circumstances, and some relied upon an objective test. The court concluded that public policy mandated an objective approach.

> As a matter of public policy and logic we conclude that the better rule warrants application of the objective approach. A subjective test suggests that it is possible to molest a child and not cause some kind of injury, an unacceptable conclusion....

> ... It is simply against public policy to indemnify a person for a loss incurred as a result of his[/her] own willful wrongdoing.

Id. at 304. Thus, the court held that policy, as well as logic, required an "objective approach" as an exception to the general rule.

B. *Prudential Property & Casualty Ins. Co. v. Karlinski*[2]

Within a year and a half of *Atlantic Employers,* the Appellate Division decided *Karlinski.* There, insured's 13-year old son (James) had engaged in a prearranged fight with a 14-year old (Mark) in which Mark had fallen and suffered a broken hip. The court was asked to determine if a homeowner's policy obligated the plaintiff insurer to defend and indemnify the defendant. The policy excluded coverage for "'bodily injury ... which is expected or intended by the insured.'" *Karlinski,* 598 A.2d at 919. The motion court granted the insurer's motion for summary judgment noting that the son of the insured "'instigated the fight and threw the first blow and started the fight. As far as I am concerned, it is intentional conduct and the coverage doesn't apply.'" *Id.* The motion judge also concluded that "a broken 'leg' [Mark actually suffered a broken hip] was not an extraordinary consequence of the fight." *Id.*

On appeal the court aptly noted, "[t]he appeal requires that we again explore the frequently visited but still unclearly charted area of liability coverage for intentional torts which produce unintended results." *Id.* The court went on to observe:

> Our review of New Jersey authorities satisfies us that ... it is difficult to ascertain a clear weight of authority on the subject of liability insurance coverage for unintended results of intentional acts. Differing combinations of variables, such as the language of the exclusion clause, the nature of the harm and

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[2] 251 N.J.Super. 457, 598 A.2d 918 (App.Div.1991).

> its relationship to the intentional act, and the availability of relief to the injured party, appear to influence the extent to which our decisions have inquired into the nature of the intent.

Id. at 921. The court then stated:

> [W]e hold that, when a coverage exclusion is expressed in terms of bodily injury expected or intended by the insured, and where the intentional act does not have an inherent probability of causing the degree of injury actually inflicted, a factual inquiry into the actual intent of the actor to cause that injury is necessary.

Id.

C. *Voorhees v. Preferred Mutual Ins. Co.*[3]

In *Voorhees,* a parent was sued for statements she had made at a public meeting where she had questioned the competency of her child's teacher. The teacher claimed she had suffered emotional distress and mental anguish as a result of the parent's conduct. The teacher alleged that the parent had acted "willfully, deliberately, recklessly and negligently," in making false accusations that had damaged the teacher professionally, and subjected her to public ridicule. *Voorhees,* 607 A.2d at 1257. Medical evidence established that the emotional distress the teacher complained of had resulted in "'an undue amount of physical complaints,' including 'headaches, stomach pains, nausea, ... [and] body pains.'" *Id.* at 1258.

The parent had a homeowner's policy that provided coverage for liability arising from "bodily injury" caused by an "occurrence." The policy defined an "occurrence" as an "accident," and excluded coverage for bodily injury intentionally caused by the insured. The insurer relied upon this language and refused to defend the insured against the

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[3] 128 N.J. 165, 607 A.2d 1255 (1992).

teacher's suit, asserting that the claims were based on the insured's intentional act and that the complaint sought damages for a "personal" rather than a "bodily" injury. The parent eventually sued her carrier for damages resulting from its refusal to provide a defense and indemnify her. Both parties moved for summary judgment.

The trial court granted the insurer's motion ruling that the complaint did not allege the kind of "bodily injury" that would be covered under the policy. A divided panel of the Appellate Division reversed.

The New Jersey Supreme Court noted that the duty to defend under the policy was not triggered "absent a potentially-coverable occurrence." *Id.* at 1262. In assessing whether the insured's statements constituted a potentially coverable occurrence, the court first held that "the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury." *Id.* at 1264. As to what constitutes an "intent to injure," the court noted that the general trend in the law appeared to require an inquiry into the actor's subjective intent to cause injury:

> We adhere to the prevalent New Jersey rule and hold that the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is "accidental," even if the act that caused the injury was intentional. That interpretation prevents those who intentionally cause harm from unjustly benefitting from insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.
>
> Even if the operative question is the intent to injure rather than to act, the question of what constitutes an "intent to injure" remains. The key issue is whether the court must find a subjective intent to

> injure, or whether it can presume an intent to injure from the objective circumstances. In that regard, our inquiry parallels that taken in interpreting policy exclusions for intentional acts. Those exclusions preclude coverage for injuries expected or intended by the insured. Case law interpreting those policy exclusions, in addition to that interpreting the definition of "occurrence," is thus relevant.
>
> The general trend appears to require an inquiry into the actor's subjective intent to cause injury. Even when the actions in question seem foolhardy and reckless, the courts have mandated an inquiry into the actor's subjective intent to cause injury.

Id. at 1264.

The court, however, recognized that:

> When the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure. That objective approach focuses on the likelihood that an injury will result from an actor's behavior rather than on the wrongdoer's subjective state of mind.

Id. at 1265. The *Voorhees* court reasoned that the insured's actions there were a far cry from the type of egregious behavior that had justified an objective approach in *Atlantic Employers.* The court held that "[a]bsent exceptional circumstances that objectively establish the insured's intent to injure," the insured's subjective intent to injure must govern. *Id.* The *Voorhees* court's reference to "exceptional circumstances" was clearly intended to recognize the need for an objective test in the specific circumstances it confronted in *Atlantic Employers,* and it foreshadowed the test it would proclaim in *Morton.*

Although the court in *Voorhees* felt that there was little evidence of a subjective intent to injure the teacher, the court never had to address this question because the plaintiff had

also alleged that the insured had acted negligently. The allegation of negligence presupposed the absence of a subjective intent to injure and stated a claim for a potentially coverable occurrence thus triggering the insurer's duty to defend. *See Id.* Accordingly, the court affirmed plaintiff's award of summary judgment.

D. SL Industries, Inc. v. American Motorists Ins. Co.[4]

In *SL Industries,* an employee had filed suit against his employer alleging age discrimination and common law fraud as a result of the employer eliminating his position. The employee sought recovery for the alleged bodily injury that resulted. The employer was insured under a policy in which the insurer agreed to defend and indemnify the employer for all sums resulting from a bodily injury caused by an "occurrence." "Occurrence" was defined as an "'accident ... which results in bodily injury ... neither expected nor intended from the standpoint of the insured.'" *SL Industries,* 607 A.2d at 1269-70.

The employer settled the suit and then brought a declaratory judgment action against its insurer to establish its right to indemnification. The Law Division granted the insurer summary judgment, but the Appellate Division reversed, holding that although intended harm was not covered under the policy, the policy did provide coverage for the unforeseen results of intentional conduct. The court then remanded the case to the Law Division to determine whether the employee's emotional distress had been intended or whether it was foreseeable.

On appeal, the New Jersey Supreme Court had to determine if the general intent to injure that is inherent in a claim of fraud necessarily incorporates the intent to cause the

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[4] 128 N.J. 188, 607 A.2d 1266 (1992). *SL Industries* summarizes and explains the evolution of the law of coverage under "occurrence-based" policies in New Jersey, and I will therefore take the liberty of quoting at length from that opinion.

specific injury (emotional distress), or whether proof of a subjective intent to cause the specific injury is required. *Id.* at 1277-1279. The court began its analysis of the required intent by examining the differing approaches taken by earlier cases.

> Our courts have taken different approaches to the question of how specifically the insured must have intended the resulting injury. Employing the *"Lyons"* test,[5] some courts have held that a subjective intent to injure ends the inquiry and precludes coverage. Under that approach, if there is a subjective intent to injure then any injury that results from the action will be deemed "intentional," even if the injury is different from or greater than that intended....
>
> On the other hand, some courts have indicated that to preclude coverage if the injury that actually occurred was not a probable outcome of the wrongful act is unfair [discussing *Karlinski*].... However, in those circumstances in which the facts indicate that the acts in which the insured engaged were unlikely to result in the degree or type of injury that in fact occurred, an inquiry into the subjective intent to cause the resulting injury is in order.
>
> A third approach is even more likely to lead to coverage. In *Hanover Insurance Group v. Cameron* [122 N.J.Super. 51, 298 A.2d 715 (Ch.Div.1973)], the court rejected the insurance company's argument that to preclude coverage only the intent to harm need be demonstrated. The court indicated that "intent" would only be found when the actual consequences that resulted from the act were intended, or when the actor was substantially certain they would result.

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[5] The test derives its name from *Lyons v. Hartford Ins. Group,* 125 N.J.Super. 239, 310 A.2d 485, 488-89 (App.Div.1973).

To determine which approach to adopt, we refer to the general principles underlying the interpretation of insurance-policy provisions involving intentional conduct.

The *Lyons* test ... precludes coverage in some cases in which an insured could reasonably expect coverage. When the injury caused significantly exceeds the injury intended or expected and is an improbable consequence of the wrongful act that caused it, then it is hard to characterize the injury as truly 'intentional.' The injury, from the standpoint of the insured, is 'accidental,' and could thus be deemed an occurrence. Moreover, if the tortfeasor did not intend or expect to cause the resulting harm, denying coverage will not deter the harmful conduct. In that case, there is no policy justification for denying the victim the possibility of additional compensation. As the *Karlinski* court noted, precluding coverage 'even if the actual harm far exceed[s] the consequences which might reasonably be expected by the insured ... diminishes the injured party's realistic possibility of recovery more than it impacts upon the insured tortfeasor.'

On the other hand, an approach allowing coverage whenever the adverse consequences intended by the tortfeasor did not precisely match the actual consequences of their wrongful actions undermines the basic policy against indemnifying wrongdoers.

We believe the *Karlinski* test presents the most reasonable approach.... Assuming the wrongdoer subjectively intends or expects to cause some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that

> intent, the injury was 'accidental' and coverage will be provided.

Id. at 1277-78 (citations omitted).

Accordingly, the court affirmed the Appellate Division's judgment remanding the case to the Law Division to determine whether the employee's emotional distress had been a probable outcome of the insured's general intent to injure, and if not, whether the insured had the subjective intent to injure the employee. *See Id.* at 1279.

E. *Morton International, Inc. v. General Accident Ins. Co.*[6]

Finally, in *Morton,* the New Jersey Supreme Court had to apply the law of "occurrence-based" insurance policies to the very different realm of injuries to the environment. There, the insured, Morton International, sued primary and excess CGL insurers seeking reimbursement for costs incurred in defending a suit filed by the Department of Environmental Protection (DEP), as well as indemnity for cleanup and remediation expenses resulting from the DEP proceeding. *Morton,* 629 A.2d at 834-835. Morton's predecessors, including Ventron Corporation, had polluted a body of water known as Berry's Creek to such an extent that "[f]or a stretch of several thousand feet, the concentration of mercury in Berry's Creek [was] the highest found in fresh water sediments in the world." *Id.* at 834. Morton's claims were derived from Ventron as well as other prior owners of the land. *See Id.* The DEP sued Ventron and other prior owners to compel them to pay for remediating the pollution of Berry's Creek and the surrounding area. The environmental damage had been caused

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[6] 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied,* —— U.S. ——, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994). The majority and I agree on the significance of certain portions of the opinion in *Morton,* but disagree as to the meaning of the language. Since it is difficult to eliminate all repetition in explaining why I disagree, I will be somewhat redundant in discussing *Morton.*

by discharges from a mercury-processing plant operated for forty years by the various defendants. *See New Jersey Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983).

In the underlying suit to establish liability, the New Jersey Supreme Court affirmed the Appellate Division's judgment holding the defendants jointly and severally liable. The court reasoned that the discharge of mercury constituted an abnormally dangerous activity, and imposed strict liability against all defendants. *See Id.*, 468 A.2d at 160.

Morton then commenced a declaratory judgment action to determine its right to indemnification from the various insurers that had provided primary and excess coverage while the mercury-processing plant was in operation. The primary issue that the court had to determine was whether the pollution resulted from an "occurrence" under the applicable policies. To qualify as an "occurrence" the environmental damage must not have been "expected nor intended from the standpoint of the insured." *Morton,* 629 A.2d at 836. The trial court granted the insurer's motion for summary judgment. The Appellate Division reversed holding that the trial court had "focused improperly on the manner in which the injury had been caused and had erroneously concluded that the policy did not provide coverage for the unexpected result of a deliberate act." *Id.* at 877 (citation omitted).

The Appellate Division also relied upon *Atlantic Employers* to conclude that "'[t]he intentional character of the act is the basis for the inference that the insured either intended or was manifestly indifferent to the prospect of injury.'" *Id.* (citation omitted). In reaching this conclusion, the Appellate Division (without the benefit of either *Voorhees or SL Industries*) noted that the "'substantial environmental pollution over a long period'" together with the knowledge by Morton's predecessors that "'the substance being discharged ... was toxic and harmful'" rendered unacceptable a conclusion that no harm had been expected. *Id.* (citation omitted).

On appeal to the New Jersey Supreme Court, Morton argued that the Appellate Division's reliance on *Atlantic Employers* improperly equated the discharge of pollutants with child molestation as acts that could be deemed intentionally injurious as a matter of law. Morton further argued that "the Appellate Division improperly invoked an objective standard for determining whether harm had been intended or expected under the 'occurrence'-based policies, ignoring the long-standing principle that coverage exists for the unintended results of intentional acts." *Id.*

The court began its analysis by acknowledging the unique circumstances that surround issues of insurance coverage for environmental damage.

> In applying our holding in *Voorhees* to claims seeking coverage for property-damage caused by environmental pollution under occurrence-based CGL policies, *we acknowledge the impracticality of adherence to the general rule* that "we will look to the insured's subjective intent to determine intent to injure." Although insureds may concede that pollutants — even known pollutants — had been intentionally discharged, those insureds are virtually certain to insist that the resultant harm was unintended and unexpected. *Absent "smoking gun" testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in [environmental insurance] coverage litigation.*
>
> We noted in *Voorhees* that an alternative to proof of subjective intent to injure existed in those cases in which the insured's "actions are particularly reprehensible, [so that] the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure." We cited *Atlantic Employers* ... as illustrative of conduct that was so inherently injurious as to warrant the conclusion that intent to injure could be presumed.... We are

> unpersuaded that environmental-pollution litigation should generally be included in that category of cases, typified by *Atlantic Employers,* in which reprehensible conduct justifies a presumption that injury was intended. *Id.*, 629 A.2d at 879 (citations omitted) (emphasis added).

Instead of relying upon such an unwarranted presumption and thereby extending the "public policy and logic" of *Atlantic Employers,* the court called for an individualized inquiry based upon the facts of each case.

> [I]nsureds held responsible for remediation of environmental pollution vary significantly in their degree of culpability for the harm caused by pollutant discharges. A general rule in environmental-pollution coverage litigation that would permit intent to injure to be presumed simply on the basis of a knowing discharge of pollutants would be unjustified.
>
> Instead, *we hold that in environmental-coverage litigation a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, "exceptional circumstances [exist] that objectively establish the insured's intent to injure."*

Id. at 879-80 (citation omitted) (emphasis added). The term "exceptional circumstances" had been used in *Voorhees.* As noted above, there, the court stated that, absent exceptional circumstances, the subjective intent of the insured controlled whether there was an "occurrence" under an occurrence-based insurance policy. In *Voorhees,* the court had stated that it was adopting the majority view that requires proof of a transgressor's subjective intent. *Voorhees* at 607 A.2d at 1255.

The court, however, had also noted that "[w]hen the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure." *Id.* at 1265. In the context of *Atlantic*

Employers, the reprehensible actions of child molestation did indeed "'[a]s a matter of public policy and logic ... warrant [ ] application of the objective approach.'" *Id.* Then, the court used the language that separates me from my colleagues. The court added: "[a]bsent *exceptional circumstances* that objectively establish the insured's intent to injure, we will look to the insured's subjective intent to determine intent to injure." *Id.* (emphasis added).

II. Morton Applied to the Instant Dispute

In *Morton,* the court was careful to distinguish the policy considerations in pollution coverage cases from those that dictated an objective approach in all cases of child molestation. "We are unpersuaded that environmental-pollution litigation should generally be included in that category of cases, typified by *Atlantic Employers,* in which reprehensible conduct justifies a presumption that injury was intended." *Morton,* 629 A.2d at 879. This does not mean, as the majority suggests, that the alleged polluter's subjective intent controlled. It only means that the act of polluting is not so reprehensible that "public policy and logic" require a presumption that the resulting harm is intended as a matter of law. Rather, the circumstances surrounding the act of polluting must be examined in each case to determine if, in that particular situation, they objectively establish an intent to harm the environment, thereby negating an occurrence.

The court then listed those circumstances that would objectively establish this intent.

> Those circumstances include the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.

Id. at 880. Accordingly, I cannot agree when my colleagues state, "[w]e believe the New Jersey Supreme Court designed the 'exceptional circumstances' exception to apply only to egregious conduct." Majority Op. at 989. One can only determine if conduct is egregious by examining the "exceptional circumstances" in which it occurred. Indeed, an examination of those circumstances may well establish that a particular polluter's conduct was not egregious at all.

The majority's error is reflected in what the court in *Morton* did. It did not require proof of the subjective intent to pollute on the part of the insured or its predecessors. Rather, it examined the record and determined that the circumstances before it objectively established an intent to harm. "In determining whether in the context of this record the trial court properly concluded, as a matter of law, that Morton's predecessors had intended or expected environmental injury, we focus on those factors [i.e. the "exceptional circumstances"] that we previously have identified to be significant." *Morton,* 629 A.2d at 882. The court then noted the duration of the discharge, the intentional nature of the discharge, the insured's knowledge of the likely environmental harm, and the history of "stonewalling." In conclusion, the court noted that its examination of these circumstances confirmed that "damage qualitatively comparable to that found to exist ... must have been anticipated by Morton's predecessors on the basis of ... prolonged knowledge of and avoidance of compliance with complaints by regulatory officials." *Id.* at 884.

This is consistent with the court's pronouncement that the mere fact of polluting, even to the egregious extent present in *Morton,* was not by itself, such reprehensible conduct that it required a conclusive presumption of an intent to harm. Moreover, the "exceptional circumstances" include "the existence of subjective knowledge concerning the possibility or likelihood of harm." However, subjective knowledge is not used to definitively determine if the insured expected or intended environmental damage. Rather, the insured's subjective knowledge is but one of those "exceptional circumstances" that determine if an "occurrence" has taken

place. It is not the start and finish of that inquiry as the majority's reasoning suggests.

The *Morton* court concluded that exceptional circumstances established as a matter of law that there had been no occurrence as Morton's predecessors had to have expected the pollution they caused. The objective nature of this conclusion is evident because the court clearly stated that is was not deciding whether Morton's predecessors "intended" (i.e. "subjectively") the damage:

> *Without determining that such damage was intended, we find inescapable the conclusion that damage qualitatively comparable* to that found to exist in the Ventron litigation *must have been anticipated* by Morton's predecessors on the basis of their prolonged knowledge of and avoidance of compliance with complaints by regulatory officials that the company was discharging unacceptable emissions, including mercury compounds, into Berry's Creek. Based on that conclusion, ... as a matter of law the property damage to Berry's Creek and the surrounding area was not caused by an "occurrence" within the meaning of the term in the various CGL policies.

Id. at 884 (emphasis added).

In adopting prior law (particularly the holding in *Karlinski*) to environmental insurance coverage, the court in *Morton* noted that subjective evidence of the polluter's intent did not become relevant merely because the extent of pollution was greater than anticipated.

> Turning to the question whether environmental injury was intended or expected, we first observe that although the magnitude of the damage to Berry's Creek and the surrounding areas may exceed any intention or expectation attributable to Morton's predecessors, we do not consider that differences in harm relating to the severity of

> environmental damage give rise to a finding of "improbability" of harm that invokes the need for evidence of subjective intent. Whether Morton's predecessors anticipated that discharges of untreated effluent on the plant site and into Berry's Creek for more than forty years would cause environmental harm of the severity described ... hardly demonstrates that the extent of the injury was "improbable." The holding in *SL Industries* was based on the Appellate Division's ruling in *Karlinski,* that in a coverage action arising from a fight between two young teenagers in which one sustained a broken hip, a factual issue of subjective intent was presented because of the inherent improbability that the skirmish would result in a hip fracture. No such inherent "improbability" can be ascribed to the environmental damage attributable to Morton's predecessors.

Id. at 882 (citations omitted).

The majority notes that the district court held that

> Chemical Leaman's actions were not so reprehensible as to justify the presumption of an intent to cause property damage under the "exceptional circumstances" *exception.* It concluded that Chemical Leaman was not "throwing toxic waste out into the meadow-lands" as Morton and its predecessors had done; rather, it had "designed and built the facility to prevent [harm to the environment]."

Majority Op. at 985-86. (emphasis added). The "exceptional circumstances" test, however, is not an "exception," but the rule that is to be applied in environmental coverage cases. In addition, although Chemical Leaman was not reducing Berry Creek to one of the world's great environmental disasters as was the case in *Morton,* there is nevertheless testimony from which a reasonable jury could conclude that "exceptional circumstances" objectively establish Chemical Leaman's intent to harm the environment.

The majority holds that after *Morton,* a court can determine that an insured is entitled to indemnification under an occurrence-based policy as a matter of law absent "exceptional circumstances." My colleagues suggest that "exceptional circumstances" merely

> define when no reasonable jury could find the insured did not intend or expect to cause property damage because objective circumstances — evidence of prolonged, intentional, or flagrant discharges of known pollutants in the face of regulatory disapproval — establish that the insured must have intended property damage. The presence of "exceptional circumstances" requires a court to enter judgment as a matter of law. Their absence, of course, does not prevent a jury from finding an insured "expected" or "intended" to cause property damage.

See Majority Op. at n.7. However, *Morton* did not quantify the factors it identified as objectively establishing intent to pollute. Rather, the "case-by-case analysis" was necessary for the fact finder to make an individualized determination of whether the nature of those factors in a particular case justified denying coverage in lieu of the limitations contained in the insurance contract. Thus, I agree that the absence of the factors detailed at footnote 7 of the majority opinion "doe[ ] not prevent a jury from finding an insured 'expected' or 'intended' to cause property damage," but not for the reason stated by the majority. Rather, it is because "subjective knowledge concerning the possibility or likelihood of harm" is one of the "exceptional circumstances" that a jury must also consider. Accordingly, if an insured knows that its actions will most likely harm the environment, just one, brief, discharge of a known pollutant by one who had otherwise complied with regulatory authorities could preclude coverage under an occurrence-based insurance policy.

The majority argues that *Morton* cannot be read as creating an objective test for intent because an insured who

"intentional[ly] discharges a known pollutant generally intends 'some sort of harm,' however *de minimis,* and the harm that actually results is usually a probable result of the discharge." Thus, (the majority suggests) an objective test "would result in a general rule precluding [all] coverage based on the knowing discharge of a pollutant." Majority Op. at 987. That is, however, precisely why it is necessary to use "exceptional circumstances" to prove intent to harm objectively in pollution cases. If the resulting inquiry establishes that the insured did objectively "intend" to harm the environment, the inquiry into the foreseeability of the actual damage makes perfect sense.

The majority expresses a further concern that reading *Morton* to require anything other than subjective intent "would be akin to a negligence standard [,and] [i]f negligent acts did not fall within the definition of a covered occurrence, then there would be no point in purchasing comprehensive general liability insurance." Majority Op. at 985 (citing *Pittston Co. v. Allianz Ins. Co.,* 905 F.Supp. 1279, 1301 (D.N.J.1995)). A properly guided inquiry into "exceptional circumstances," however, does not equate with a negligence standard. It assigns the cost of environmental remediation not based upon negligence, but upon the "degree of culpability for the harm caused by pollutant discharges." *Morton,* 629 A.2d at 879.

III. The Exceptional Circumstances of The Bridgeport Site.

Throughout the time the pond and lagoon system was in use there were repeated discharges of waste through the overflow pipe to the adjacent swamp. In fact, the very purpose of the overflow pipe was to allow for these discharges. An Inspector observed the discharge from the last pond during a September 12, 1961 visit and thereafter observed similar discharges on about half of his visits to the Bridgeport site. In November 1968, water pollution inspectors from the New Jersey Department of Health again observed the discharge from the overflow pipe in the last lagoon. Although it was

characterized as a sporadic "trickle", an engineer employed by Chemical Leaman (Elston), and at least one other employee admitted that the overflow pipe did discharge into the swamp throughout the time the pond and lagoon system was in use. Moreover, there was evidence that by 1974, the path of this "trickle" from the last impoundment could "be easily seen by looking for a 75-foot wide lane of dead trees" in the swamp.

The *Morton* court concluded that the discharge of pollutants there was intentional once the polluters knew it was unacceptable. *Morton,* 629 A.2d at 882. There, the repeated demands of the Department of Health that the owner halt the discharges or install adequate treatment facilities were regularly ignored. *Id.* Here, the intentional nature of the discharge is also evident. Chemical Leaman intentionally designed its waste treatment system so that the overflow pipe would discharge into the swamp. Furthermore, even under the subjective framework that the jury was given to review the evidence, it concluded that Chemical Leaman's releases were intentional. That conclusion is supported by the record and Chemical Leaman cannot now successfully argue that the discharges were anything but intentional. Indeed, Chemical Leaman's denials illustrate the concern expressed in *Morton* that a polluter may admit to the discharge, but would never admit to intentionally polluting the environment. That concern could only be satisfactorily addressed by the objective test that the majority today rejects.

Here, as in *Morton,* the intentional nature of the discharge is confirmed by Chemical Leaman's continued evasion of the State's demands to stop the discharge. The unacceptable condition of the discharge from the overflow pipe into the swamp was brought to Chemical Leaman's attention by a governmental inspector in September of 1961. Although Chemical Leaman installed three more lagoons in an attempt to alleviate this situation, the overflow pipe remained a staple of the Bridgeport site and in 1968, Chemical Leaman was still discharging wastes into the lagoon.

State officials regularly informed Chemical Leaman that the effluent flowing from the overflow pipe constituted an unacceptable discharge into the swamp. In 1961, FGW told Chemical Leaman that the discharge was an unacceptable condition and that the resulting pollution should be stopped within a year. Subsequently, in 1968, the NJDOH told Chemical Leaman that "the waste emanating from the lagoon is highly pollutional and [that] immediate measures [should] be taken to eliminate this discharge or to sufficiently treat the waste prior to discharge" and in 1969, Chemical Leaman was ordered to find an alternative method of waste treatment.

Chemical Leaman argues that it was not aware of the harmful propensities of its pollutants because it was not discharging pure chemicals, but rather "trace amounts" of these chemicals in highly diluted rinsewater. The uncontroverted evidence, however, clearly showed that at least by 1968, Chemical Leaman was alerted that the discharge into the swamp was "highly pollutional" even in its diluted form. Furthermore, as noted above, however diluted the discharge may have been, it was sufficiently potent to sculpt the 75-foot wide path of dead trees into the environmental landscape it touched.

It is certainly true that Chemical Leaman is more sympathetic than the polluters in *Morton,* who engaged in a deliberate pattern of "stonewalling" characterized by promises of compliance that went unfulfilled. *Morton,* 629 A.2d at 882. As the majority notes, Chemical Leaman apparently thought that its natural filtration system would reduce the danger of pollution. In fact, it was designed to do just that. Nevertheless, the record here could clearly support a finding that Chemical Leaman was "stonewalling" regulatory authorities. There is a pattern of unfulfilled promises of compliance to state agency requests to abate the polluting discharge.

Even after officials caught Chemical Leaman discharging into the swamp in 1968 and ordered it to find a better way to treat wastes in 1969, Chemical Leaman did not improve the waste treatment system until the summer of 1975, when it

entered into a disposal contract with Du Pont. In the interim, 40 to 50 million gallons of contaminated waste water had been processed using the same treatment system.

Thus, from 1961, when the State first notified Chemical Leaman that the discharge to the swamp was unacceptable, until 1975, when Chemical Leaman began off-site disposal at the Du Pont plant, Chemical Leaman responded to regulatory agencies with promises of compliance that went unfulfilled. Chemical Leaman was informed that the discharge to the swamp was unacceptable. Although the state did not articulate why the discharge was improper, it is difficult to imagine what other reason Chemical Leaman could have attributed to the state's concern if not the impact of the discharge upon the environment. It is clear from Chemical Leaman's own argument in this regard that it never attempted to ascertain the reason for the State's concern.

Nevertheless, assuming *arguendo* that in 1961 Chemical Leaman could not ascertain that its system was damaging the environment, there is no dispute that Chemical Leaman learned that the discharges to the swamp were likely to cause harm as of November of 1968, when it was expressly told that "the waste emanating from the lagoon is highly pollutional and [that] immediate measures [should] be taken to eliminate this discharge or to sufficiently treat the waste prior to discharge." Even more telling is Harry Elston's concession at trial that both at the time of FGW's inspections in 1961 and 1962, and at the point when NJDOH issued its order in 1969, he knew that Chemical Leaman's discharge into the swamp was causing some damage to the swamp. Finally, it should be noted that Chemical Leaman never obtained the required permits for its waste disposal cite. Thus, it took regulatory authorities even longer to discover the "highly pollutional" discharge. Once the cite was discovered, Chemical Leaman's compliance with regulatory agencies was less than exemplary.

Chemical Leaman discharged approximately 100 million gallons of contaminated waste water into its unlined ponds and lagoons for the fifteen years that the Bridgeport site was

in operation. The bottom of those lagoons was only two and a half feet above the groundwater, and the insurers' expert testified that the soil, groundwater, and swamp contamination was the probable result of this discharge. That testimony was not refuted by Chemical Leaman's expert even though Chemical Leaman argues on appeal that their unlined treatment system was the state of the art.

I cannot say that such a course of conduct does not negate the existence of an occurrence under New Jersey law.

IV. Conclusion

Courts that have addressed the issue of the kind of intent that would negate insurance coverage under an occurrence-based policy have been guided by certain policy considerations. Courts have attempted to maximize the possibility that victims be compensated for their injuries while minimizing indemnification of the wrongdoer. *See Voorhees,* 607 A.2d at 1264. They have also been concerned that the law in this area deterred wrongdoers. *See SL Industries,* 607 A.2d at 1278. Looking to "exceptional circumstances" to objectively determine intent to harm the environment does just that. To the extent that those circumstances suggest that the insured did not intend environmental harm, and cooperated with regulatory authorities to avoid it, the insured will likely be indemnified for the cost of remediation under an occurrence policy even where it discharged a known pollutant. To the extent that those circumstances establish a protracted and/or deliberate discharge, however, a disregard for the environment, knowledge of the properties of a pollutant, "stonewalling" regulatory agencies and the insured's subjective knowledge of the possibility of harm; "public policy and logic"[7] require that the insured, and not its insurers, pay the cost of environmental cleanup. That allocation of cost deters persons from closing their eyes to the environmental impact of their activities.

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[7] *See Atlantic Employers,* 571 A.2d at 304.

Furthermore, this is consistent with the long-standing doctrine of enforcing insurance contracts in a manner that is consistent with the reasonable expectations of the parties. An insured cannot reasonably expect to escape the "occurrence-based" limits on its right to indemnification where "exceptional circumstances" establish its culpability for pollution. Similarly, an insurer should be able reasonably to expect that it will not be required to reimburse such a polluter for the environmental damage so callously caused.

This is the result the New Jersey Supreme Court sought to promote in *Morton*. Yet, the rule we adopt today will give polluters comfort and allow them to discharge pollutants in relative safety because of the obvious impracticality of establishing their subjective intent to harm the environment. Since the New Jersey Supreme Court recognized the impracticality of a subjective approach in environmental coverage disputes, I find it difficult to believe that it intended this result.[8] The majority concludes that the New Jersey Supreme Court established a subjective standard in environmental insurance disputes while proclaiming such a rule to be so impractical as to be unworkable. As a result, our holding places insurers in the impossible situation the New Jersey Supreme Court sought to avoid by its thoughtful pronouncement of an objective "exceptional circumstances" test in disputes over liability for cleaning up pollution.

Present BECKER, STAPLETON, MANSMANN, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges.

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[8] Indeed, the difficulty with the approach we adopt is even greater than was expressed in *Morton* because the "smoking gun testimony from a disgruntled employee" often needed to establish subjective intent would surely be subject to effective impeachment by any decent litigator. Thus, although the employee's antagonism may motivate him or her to provide the evidence necessary to establish the employer's intent to pollute, it would also establish bias and motive to fabricate testimony and thereby minimize that testimony's probative value.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants Robin Anthony Gildart Jackson, an Underwriter at Lloyds, London, et al. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge McKee would grant rehearing.

1

CHEMICAL LEAMAN TANK LINES, INC., Plaintiff-Appellee

v.

The AETNA CASUALTY & SURETY COMPANY, Et Al., Robin Anthony Gildart Jackson, an Underwriter at Lloyd's, London, Et Al., Defendants-Appellants in No. 93-5777,

The Aetna Casualty & Surety Company, Defendant-Appellant in No. 93-5794.

Nos. 93-5777, 93-5794.

United States Court of Appeals,
Third Circuit.

Dec. 15, 1995.

Before: SCIRICA, NYGAARD and McKEE, Circuit Judges.

ORDER FOR PANEL REHEARING

It is hereby ordered that, pursuant to Internal Operating procedure 9.5.7, panel rehearing is granted in the above captioned appeal, and the opinion previously filed on October 12, 1995, is hereby vacated.

CHEMICAL LEAMAN TANK LINES, INC.

v.

The AETNA CASUALTY AND SURETY COMPANY; and Certain Underwriters at Lloyds, London, subscribing to Insurance Policies Numbers WAR 6771, WAR 6772/A, C62P 10-117, L62P 10-117, 64P 3-121, L64P 3-121A, L64P 3-121B, C64P 3-121B, C65P 5- 119, C65P 5-119A, L65P 5-119A, L66P 5-119A, C67P 4-158, L67P 4-158, C68P 2-116, L68P 2-116, C68P 2-116A, C68P 2-116B, L68P 2-116A, L68P 2-116B, C71-03-03-13, L71-03-03-13, C71-03-03-13A, C71-03-03-13B, L71-03-03-13A, L71-03-03-13B, C74- 03-18-02, 77-01-19-23, 77-01-19-23A, C77-01-19-23B, 79-04-19-10, C80-02-19-09, C80-02-19-09B, L80-02-09A, L80-02-19-09A, L80-02-19-09B, C83-02-19-09, L83-02-19-09A, L83-02-19-09B, L83-02-09C

Robin Anthony Gildart Jackson, an Underwriter at Lloyds, London, individually and in his capacity as representative Underwriter at Lloyds, London for certain subscribing Underwriters at Lloyds, London who subscribed to certain liability insurance policies issued to plaintiff Chemical Leaman Tank Lines, Inc.; Accident and Casualty Company of Winterthur; Alba General Insurance Company Ltd.; Allianz Cornhill International Insurance PLC, formerly Known as Allianz International Insurance Company Ltd.; Anglo-French Insurance Company Ltd.; Argonaut Northwest Insurance Company; Assicurazioni Generali SPA; Baloise Fire Insurance Company; Bellefonte Insurance Company Ltd.; British National Life Insurance Society Ltd.; CNA International Reinsurance Co. Ltd., formerly Known as CNA Reinsurance of London Ltd.; Delta Lloyd Non-Life Insurance Company; Dominion Insurance Company Ltd.; Drake Insurance Company Ltd.; Edinburgh Insurance Company; Excess Insurance Company Ltd.; Fidelidade Insurance Company; Folksam International Insurance Company (U.K.) Ltd.;

Helvetia Accident Swiss Insurance Company; Indemnity Marine Assurance Company, Ltd.; Lexington Insurance Company Ltd.; London & Overseas Insurance Company, Ltd.; London & Edinburgh Insurance Company, Ltd.; London & Scottish Assurance Corporation, Ltd.; Gan Minster Insurance Company, formerly Known as Minster Insurance Company Ltd.; National Casualty Company; National Casualty Insurance of America, Ltd.; New London Reinsurance Company, Ltd.; North Atlantic Insurance Company Ltd., formerly Known as British National Insurance Co. Ltd.; Orion Insurance Company Ltd.; Pine Top Insurance Company Ltd.; River Thames Insurance Company Ltd.; Scottish Lion Insurance Company; Sovereign Marine and General Insurance Company, Ltd.; Sphere Insurance Company Ltd.; St. Katherine Insurance Company Ltd.; Stronghold Insurance Company Lts.; Swiss Union General Insurance Company Ltd.; Taisho Marine & Fire Insurance Company (Europe) Ltd., formerly Known as Taisho Marine & Fire Insurance Company (U.K.) Ltd.; Tokio Marine & Fire Insurance Company (U.K.) Ltd.; Turegum Insurance Company Ltd.; Unionamerica Insurance Company; United Standard Insurance Company Ltd.; Winterthur Swiss Insurance Company; World Auxiliary Insurance Corporation Ltd.; Yasuda Insurance Company (U.K.) Ltd. (hereinafter collectively referred to as "Jackson & Companies"), Appellants in No. 93-5777

Aetna Casualty and Surety Company ("Aetna"), Appellant in No. 93-5794.

Nos. 93-5777, 93-5794.

United States Court of Appeals,
Third Circuit.

Argued Sept. 26, 1994.

Decided Oct. 12, 1995.

Insured brought action against primary and excess comprehensive general liability (CGL) insurers to recover costs incurred in cleaning up environmental site. After granting partial summary judgment in favor of insured, 788 F.Supp. 846, the District Court, 817 F.Supp. 1136, Stanley S. Brotman, J., found issues of fact precluding summary judgment on whether insured expected or intended the damage. Excess insurer appealed. The Court of Appeals, McKee, Circuit Judge, held that: (1) environmental harm from overflow pipe and lagoons for wastewater with hazardous chemicals was not improbable and was objectively expected or intended by insured after it was told that discharge from pipe polluted swamp; (2) Court of Appeals was not required to parse out components of environment and determine insured's intent with regard to each; (3) objective standard must be used in determining whether environmental damage was either expected or intended from standpoint of insured; (4) owned-property exclusion did not bar coverage; (5) New Jersey law recognizes continuous trigger theory; (6) joint and several liability is improper for insurance policies activated by ongoing occurrence; and (7) insured's late notice of claim did not bar coverage.

Reversed and remanded.

Scirica, Circuit Judge, dissented and filed opinion.

1. Insurance 178.6

Under New Jersey law, time of "occurrence" as used in liability policy is time when complaining party is damaged

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts 924.1

Court of Appeals on appeal governed by state law must apply state law as it exists today, even if law may have changed since judgment of district court.

3. Insurance 433.2

Under New Jersey law, insured's conduct can be exceptional circumstance warranting judicial finding of intent and precluding coverage under comprehensive general liability (CGL) insurance policy, even if conduct is insufficiently reprehensible, egregious, and injurious for damage to be accident.

4. Insurance 433.2

Under New Jersey law, insured's subjective intent is relevant to whether accident or occurrence took place under comprehensive general liability (CGL) insurance policy if extent of environmental harm is improbable or unforeseeable; in that case there is still "accident" or "occurrence" unless insured subjectively intended to cause that specific harm.

5. Insurance 433.2

Under New Jersey law, case-by-case analysis based on all available evidence is required to determine whether exceptional circumstances objectively establish intent to injure precluding coverage under comprehensive general liability (CGL) insurance policy.

6. Insurance 437.2(1)

Under New Jersey law, insured's objective intent to injure is not threshold issue to be decided by court as matter of law with respect to coverage under comprehensive general liability (CGL) insurance policy; if there are disputed issues of fact, trier of fact must examine all evidence and determine whether exceptional circumstances exist that objectively establish insured's intent to injure.

7. Insurance 433.2

Under New Jersey law, environmental harm from overflow pipe and lagoons for wastewater with hazardous chemicals was not improbable and was objectively expected or intended by insured after it was told that discharge from pipe polluted swamp, and, thus, no "occurrence" or "accident" subsequently

took place under excess comprehensive general liability (CGL) insurance policies, even if insured had good faith belief that soil in lagoons acted as natural cleanser; insured designed system so pipe would discharge into swamp and continued using it for years after being ordered to find better way.

8. Insurance 433.1

Under New Jersey law, "severity of harm" relevant to probability of environmental harm and coverage under comprehensive general liability (CGL) insurance policies can refer to different components of environment that are ultimately injured by pollution.

See publication Words and Phrases for other judicial constructions and definitions.

9. Insurance 433.2

Under New Jersey law, Court of Appeals was not required to parse out components of environment and determine insured's intent with regard to each in order to determine whether insured intended or expected environmental harm and coverage existed under excess comprehensive general liability (CGL) insurance policies.

10. Insurance 433.2

Under New Jersey law, objective standard must be used in determining whether environmental damage was either expected or intended from standpoint of insured and was covered under comprehensive general liability (CGL) insurance policies.

11. Insurance 433.2

Under New Jersey law, if exceptional circumstances objectively establish that insured expected or intended to cause environmental damage, there is no "occurrence" and no coverage under comprehensive general liability (CGL) insurance policy, unless extent of damage was unforeseeable; if extent of damage was unforeseeable, there is coverage unless insured

subjectively intended or expected that damage was likely to result.

12. Federal Courts 937.1

Remand was required by district court's erroneous use of subjective, rather than objective, test for insurance coverage when balancing probative value against prejudicial effect of evidence of environmental problems at insured's other sites. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

13. Insurance 434(2)

Under New Jersey law, owned-property exclusion of comprehensive general liability (CGL) insurance policies did not bar coverage for pollution cleanup to remedy groundwater contamination to wells neighboring insured's site and prevent further injury to other wells.

14. Insurance 178.6

New Jersey law recognizes continuous trigger theory of coverage for progressive indivisible injury or property damage from environmental contamination under comprehensive general liability (CGL) insurance policy.

15. Federal Civil Procedure 2182.1

Review of instructions is plenary; Court of Appeals focuses on whether charge, as a whole, fairly and adequately submits issues to jury.

16. Insurance 512.1(1, 3)

Under New Jersey law, joint and several liability is improper for insurance policies activated by ongoing occurrence under continuous injury trigger; rather, limits of triggered policies must be allocated based on degree of risk transferred or retained by insured during years of exposure.

17. Insurance 178.6

Under continuous trigger of New Jersey law, injury covered by comprehensive general liability (CGL) insurance

policy occurs during each phase of environmental contamination; thus, injury occurs as soon as soil and groundwater are exposed to contaminants.

18. Insurance 178.6

Under continuous trigger of New Jersey law, injury covered by comprehensive general liability (CGL) insurance policy need not manifest itself in each policy year so long as there is continuous, indivisible process resulting in damage.

19. Insurance 178.6

Under continuous injury trigger of New Jersey law, jury can find that property damage occurred during each policy period if there is proof that indivisible injurious process took place during policy period, regardless of when actual environmental injury became manifest.

20. Insurance 539.8

Under New Jersey law as predicted by district court, insured's late notice of claim did not bar coverage under excess comprehensive general liability (CGL) insurance policies, unless insurer showed appreciable prejudice in ability to contest coverage; New Jersey Supreme Court would adopt test of *Morales,* 423 A.2d 325.

Brian J. Coyle (Argued), Peter E. Mueller, Harwood Lloyd, Hackensack, NJ, Edward M. Dunham, Jr., Daniel W. Cantu-Hertzler, Miller Dunham Doering & Munson, Philadelphia, PA, William H. Jeffress, Jr., Miller, Cassidy, Larroca & Lewin, Washington, DC, for Appellant Aetna Casualty & Surety Company.

John G. McAndrews, Henry Lee (Argued), Hannah M. O'Driscoll, Gary P. Schulz, Mendes & Mount, New York City, William J. Hanley, Ronca, McDonald & Hanley, Livingston, NJ, for Appellant Robin Anthony Jackson, An Underwriter at Lloyds, London, and Certain London Market Insurance Companies ("London Market Insurers").

Kevin B. Clark (Argued), John P. Dean, Carlisle E. Perkins, Conrad J. Smucker, Willkie Farr & Gallagher, Washington, DC, for plaintiff-appellee Chemical Leaman Tank Lines, Inc.

Thomas W. Brunner, John E. Barry, Dennis A. Tosh, Wiley, Rein & Fielding, Washington, DC, for Amicus Curiae Insurance Environmental Litigation Association.

Deborah T. Poritz, Attorney General of New Jersey, Mary C. Jacobson, Assistant Attorney General, Karen L. Jordan, Deputy Attorney General, Trenton, NJ, for Amicus Curiae State of New Jersey, Department of Environmental Protection and Energy.

Before: SCIRICA, NYGAARD and McKEE, Circuit Judges.

OPINION OF THE COURT

McKEE, Circuit Judge.

Chemical Leaman Tank Lines, Inc. brought this declaratory judgment action in an effort to determine if various policies of insurance issued by defendant insurance companies covered the cost of environmental cleanup of a waste disposal site it maintained in Bridgeport, New Jersey. Although numerous issues are raised on appeal, the primary issue is the appropriate test to determine if Chemical Leaman "expected or intended" environmental damage. We hold that, under New Jersey law, the appropriate inquiry is the insured's objective intent and that the district court erred when it instructed the jury that it must determine if Chemical Leaman subjectively "expected or intended" to damage the environment. Since we determine as a matter of law that Chemical Leaman did expect or intend environmental damage as of November, 1968, we remand for a new trial to determine Chemical Leaman's objective intent during the years remaining in question.

I. Background

A. *The Bridgeport Site*

Chemical Leaman is a tank truck company specializing in the transportation of hazardous chemicals including carcinogens. The Bridgeport terminal at issue here was one of many terminals that Chemical Leaman maintained across the country. These terminals included facilities where Chemical Leaman would routinely wash the trailers that transported the hazardous chemicals after those chemicals had been delivered. The rinse water contaminated with residue from the inside of the trailers was disposed of in a wastewater treatment system that is at the heart of this lawsuit.

The Bridgeport wastewater treatment system consisted of a series of unlined ponds dug into the soil to catch and purportedly purify the contaminated washwater. Apparently, the designers of this system believed that the sandy bottom of the unlined ponds would purify the contaminated rinsewater by acting as a kind of natural filter that would strain the impurities from the contaminated water as it percolated into the soil. The facility operated in this manner from 1960 to 1975. It was designed and built by Harry Elston, Chemical Leaman's Manager of Real Estate and Engineering, in consultation with Edwin Wagner, a professional sanitary engineer with experience in the design of waste treatment facilities. Elston made virtually all of Chemical Leaman's decisions regarding waste management and disposal.

From 1960-62, the wastewater treatment system consisted of a series of three unlined settling and percolation ponds, connected by "tee pipes." Elston testified that the depth of the ponds was limited to five feet to allow sunlight to enhance the growth of aerobic microbes that fed on the trace amounts of chemicals in the rinsewater. This natural process was enhanced by anaerobic microbes acting in the ponds and lagoons to biodegrade the chemical particulates in the rinsewater. Gravity separated heavier materials from lighter ones in the first pond, and the floating contaminants were then periodically skimmed from the top of the ponds, and the

settled materials were periodically dredged from the bottom of the ponds. The natural processes of aerobic and anaerobic microbial biodegradation would break down the trace chemical constituents which remained in the rinsewater.

A "tee pipe" connected the first and second ponds so as to prevent the precipitated and floating materials from passing into the second pond. Thus, only "cleaner" water could reach the second pond. When this rinsewater reached the second pond, the retention, phased gravity separation, percolation and microbial biodegradation process was repeated. Only the rinsewater in the middle depth of that pond was allowed to flow into the third pond. These processes continued in the third pond, which received the "cleanest" water as a result of the processes occurring in the first two ponds. Elston testified at trial that the Bridgeport site was specially selected for its suitability for this kind of percolation system.

In 1962, Chemical Leaman augmented this system by adding two larger aeration lagoons and a final settling lagoon with a limestone bed. Each of these lagoons was designed to replicate and enhance the treatment afforded by the original three ponds. In addition, the fourth and fifth lagoons were equipped with spray aeration devices to increase the oxygen level in the lagoons and, thereby, increase aerobic microbial biodegradation and evaporation.

From the very beginning of this system, the final impoundment pond contained an overflow pipe at the top end of the berms which fed into an adjacent swamp. The pipe was apparently intended as a safety valve to prevent a rupture in the berms and a resulting massive loss of rinsewater in the event of a heavy rain. Between 1960 and 1975, there were repeated discharges of treated rinsewater through the overflow pipe to the adjacent swamp. Elston described this discharge as a "trickle," and another witness testified that the amount coming out of the overflow pipe was usually about a fraction of an inch. Nevertheless, a 1970 New Jersey Department of Health sample of the swamp water that the rinsewater "trickled" into revealed that this trickle was "highly

pollutional." Moreover, by 1974 the path of the "trickle" from the last impoundment could "be easily seen by looking for a 75 foot wide lane of dead trees" in the swamp.

B. *The Insurance Policies*

Chemical Leaman purchased primary comprehensive general liability insurance ("CGL") from the Aetna Casualty & Surety Company ("Aetna") covering successive years, from April 1, 1959 through April 1, 1985.[1] During this same period of time, the London Market Insurers ("LMI") sold Chemical Leaman excess CGL coverage.[2] Each of the primary and excess policies provided coverage (and a duty to defend) only for fortuitous damage, i.e. damage that was "neither expected nor intended from the standpoint of the insured." Some of these policies insured against an "accident," and others insured against an "occurrence" but it is clear that each of these policies covered only fortuitous damage, i.e. damage that the insured neither expected nor intended.

The LMI policies typically stated:

> [s]ubject to the limitations, terms and conditions [of the policy] to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability ... imposed upon the Assured by law, ... for damages ... on account of: ... (ii) Property

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[1] During trial, Chemical Leaman dismissed its claims against the 1981-1985 policies, and the district court granted summary judgment in favor of Aetna on the 1959-1960 policy because Chemical Leaman had not presented evidence of damage that could have triggered this policy. We need not discuss the specific provisions of the Aetna policies since they have withdrawn as a party to this appeal. *See infra* at 666.

[2] At oral argument before the district court, Chemical Leaman dismissed any claims it had against LMI on the policy running from April 1, 1985 to April 1, 1986. Apparently, Chemical Leaman dismissed its claims against the 1981-1985 policies as well. The LMI do not state what happened in their brief, as they say they provided excess coverage from 1960-1981 and cite to a stipulation in the appendix, but the stipulation states they provided coverage from 1958-1986.

> Damage ... caused by or arising out of each occurrence....

These policies defined "occurrence" as "[a]n accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in ... property damage ... during the policy period."[3]

The policies required that the insured provide written notice in the event of an occurrence or accident "as soon as practicable." The policies also provided that the insured shall cooperate with the insurer in the defense of a potentially coverable claim, suit or proceeding instituted against the insured or insurer.

Each LMI policy from April 1, 1971 to April 1, 1985, contained a pollution exclusion clause. Because we hold that those policies do not insure against the damage that occurred after November, 1968, we do not reach any of the issues raised under the pollution exclusion clauses.

C. *Contamination of the Bridgeport Site*

At the time the Bridgeport facility was built, New Jersey prohibited the construction of industrial waste treatment systems without the approval of the New Jersey Department of Health ("NJDOH"), and this prohibition was especially applicable to treatment facilities discharging effluent into surface and underground waters. *See* N.J.Rev.Stat. § 58:10-5 (1937) (prohibiting pollution of freshwater without Department of

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[3] Some of the LMI's earlier policies insured against an "accident," which was circularly defined as "an accident or series of accidents arising out of one event or occurrence." On summary judgment, the district court reasoned that New Jersey law defines the term "accident" in the accident-based policies in substantially the same manner as the definition of an "occurrence" in the occurrence-based policies—an event neither expected nor intended by the insured. *See Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, 817 F.Supp. 1136, 1148 (D.N.J.1993). Thus, the court held that Chemical Leaman would bear the same standard of proof on the accident policies as it would on the occurrence-based policies. This finding is not challenged on appeal.

Health permit) (repealed 1977); N.J.Rev.Stat. §§ 58:11-10, 11-12 (1937) (requiring Department of Health approval for any change in sewage or industrial waste treatment system; owner of such system must periodically furnish information required by the department) (repealed 1977); N.J.Rev.Stat. §§ 58:12-1, 12-2, 12-3 (1937) (prohibiting operation of a plant for the treatment of polluting substances from which the effluent is to flow into any waters of the states unless approved by Department of Health; "waters of the state" include ... all springs, streams and bodies of surface or groundwater) (repealed 1977).

Chemical Leaman never obtained the required permits or approvals from the State of New Jersey to construct or operate the waste water disposal facility at Bridgeport. However, despite Chemical Leaman's failure to get official approval, the State of New Jersey learned the Bridgeport site was in operation. In March 1961, the New Jersey Division of Fish, Game & Wildlife ("FGW") received a complaint of a number of dead fish in a pond that was fed by swamp water flowing from the direction of the Bridgeport facility. The complaint suggested that Chemical Leaman's facility may be responsible. On September 12, 1961, Inspector Walter Robinson of the Pollution Unit of the FGW inspected the Bridgeport facility and noticed a discharge into the swamp from the overflow pipe in the last pond. Robinson had observed this discharge on about half of his visits to the Bridgeport site, and had concluded in a report dated September 12, 1961 that "these conditions are not satisfactory." Thereafter, Chemical Leaman was asked to stop the discharge.

Chemical Leaman responded by agreeing to attempt to purchase property to use as a disposal area and to retain a consultant to correct this situation. In return, FGW informed Chemical Leaman that FGW expected "all work to be completed and pollution stopped by September 1, 1962." Chemical Leaman's response was the construction of the second set of unlined earthen aeration lagoons and the final settling lagoon discussed earlier.

Inspector Robinson revisited the Bridgeport site on July 31, 1962, to check on the status of the new treatment system. His progress report noted that while a new spray disposal system had been installed in an adjacent field, the area still "has to be diked and a new separator has to be installed in the old settling ponds." Although his report noted that the work should be completed in six weeks, there is no indication that this work was ever completed. Robinson's "Progress Report" did note that effluent was seeping into the ground as intended and not into the swamp and that this was "a good indication" that the new treatment system was working properly. However, at trial, Robinson testified that he may have thought the pits were lined, since "that's the way things were done." Moreover, Robinson's responsibility was limited to preventing discharges to adjacent waters that could affect the fish or wildlife in the State of New Jersey. Thus, seepage into the ground, whether or not potentially harmful to the groundwater, or any aspect of the environment other than fish and wildlife, was not his concern.[4]

Robinson's initial optimism proved unfounded when, in November 1968, water pollution inspectors from the New Jersey Department of Health ("NJDOH") again observed a discharge from the overflow pipe in the last lagoon. The NJDOH water pollution inspectors concluded that "the waste emanating from the lagoon is highly pollutional and [that] immediate measures [sic] be taken to eliminate this discharge or to sufficiently treat the waste prior to discharge." The inspectors also concluded that the Bridgeport site was operating in violation of State statutes since it was discharging an effluent without appropriate Departmental approval. As a result, in February 1969 the NJDOH ordered Chemical Leaman to

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[4] Ironically, while assessing Chemical Leaman's proposed solution for its pollution problem, Robinson observed one trailer being drained directly onto the parking lot. While such conduct was apparently a violation of company policy and would subject the individual to disciplinary action, this was not the only occasion on which he observed this prohibited conduct.

submit plans "concerning the methods and operations of a system designed to properly treat the effluent of their tank truck washing facility." In May 1969, Chemical Leaman submitted a plan for a new rinse water treatment system designed by its own engineering department. However, State regulators rejected this plan as they found the amount of remaining chemical residue in the treated rinsewater that would be discharged to a nearby stream to be unacceptable.

In February 1970, the NJDOH sampled the waste water in the lagoons and found the discharge to be "objectionable." Thereafter, State officials again met with Chemical Leaman in an unsuccessful attempt to resolve the polluting discharges at the Bridgeport site. Chemical Leaman eventually entered into a consent judgment with the New Jersey Department of Environmental Protection ("NJDEP") on January 28, 1974, which mandated construction of an approved facility by April 1974. Subsequently, in 1975, Chemical Leaman fully alleviated its waste water disposal problems when Du Pont agreed to take and treat the waste water.

From November 1968, when water pollution inspectors from the NJDOH observed the discharge from the overflow pipe, until the summer of 1975, when the contract with Du Pont was entered into, some 40 to 50 million gallons of contaminated waste water was processed using the same treatment system as modified in 1962. Throughout the time the Bridgeport site was in operation Chemical Leaman discharged approximately 100 million gallons of contaminated waste water into the unlined ponds and lagoons, the bottoms of which were only two and a half feet above the groundwater.

In late 1980, a routine NJDEP survey revealed the existence of contaminated groundwater at and around the Bridgeport site. A subsequent investigation disclosed that groundwater beneath the terminal was contaminated and that Chemical Leaman's unlined ponds and lagoons were the primary source of contamination. Thereafter, Chemical Leaman entered into an Administrative Consent Order with the NJDEP to study the scope of the groundwater contamination

at Bridgeport, and in 1984, the United States Environmental Protection Agency ("EPA") placed the Bridgeport Site on the Superfund National Priorities List. 42 U.S.C. §§ 9605, 9607.[5] As an owner and operator of the site, Chemical Leaman is strictly liable under CERCLA for the cost of the environmental cleanup. *Id.*

In July 1985 Chemical Leaman entered into a consent decree with the EPA based upon a finding that four neighboring wells were contaminated, and that three more were threatened. In that decree Chemical Leaman acknowledged liability and agreed to undertake a Remedial Investigation and Feasibility Study ("RI/FS") of environmental contamination at the site. It is this CERCLA liability for which Chemical Leaman seeks coverage under the policies purchased from the insurers.

II. Procedural History

Chemical Leaman filed a declaratory judgment action in district court to determine its right to insurance coverage after Aetna and LMI refused to indemnify it for any of the costs of the environmental cleanup at the Bridgeport facility.

On March 31, 1992, after extensive discovery, the district court filed an opinion granting partial summary judgment in favor of Chemical Leaman. *See Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, 788 F.Supp. 846 (D.N.J.1992). The court held that the "owned property exclusion" contained in the policies does not bar coverage for the costs of remedial measures designed to benefit the ground or surface waters in the vicinity of the Bridgeport site.[6]

Subsequently, the district court ruled that genuine issues of material fact remained as to whether Chemical Leaman expected or intended to cause soil and groundwater damage. *See Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur.*

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[5] 42 U.S.C. § 9607(a)(1).

[6] The other issues that the district court decided as a matter of law are not raised on this appeal.

Co., 817 F.Supp. 1136 (D.N.J.1993). The district court rejected the insurers' argument that Chemical Leaman's objective intent to injure the soil and groundwater controlled whether there had been an "occurrence" under the insurance policies. The court also relied on *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 607 A.2d 1255 (1992), to conclude that Chemical Leaman's actions at the Bridgeport site were not so "reprehensible" as to require a presumption that Chemical Leaman expected or intended to cause the groundwater and soil damage. Instead, the court concluded that Chemical Leaman had the burden of proving that it did not subjectively intend to cause soil and groundwater damage, and that it was not substantially certain that it was causing such damage.

[1] In ruling upon motions for partial summary judgment, the court found that soil and groundwater damage occurred sometime during 1960, thus triggering the 1960-61 policies. The court also ruled as a matter of law that soil and groundwater damage occurred in the policy year April 1, 1960 to April 1, 1961, but that the continuous trigger doctrine determined whether property damage also occurred under the remaining policies.[7] Since there were disputed issues of fact the court held that the jury would have to determine whether injuries occurred during each policy period, whether Chemical Leaman subjectively expected or intended the injuries, and whether the injuries caused by the use of the Bridgeport rinsewater treatment system were of a continuous, indivisible nature. Finally, the court held that Chemical Leaman's failure to promptly notify its insurers of its liability under CERCLA did not bar recovery under the notice provisions of the various insurance policies because the insurers had not been prejudiced by the delay.

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[7] The time of an "occurrence" is the time when the complaining party is damaged. *See Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co.*, 98 N.J. 18, 483 A.2d 402, 409 (1984).

Prior to trial, Chemical Leaman filed a motion *in limine* to bar evidence of environmental problems it had encountered at sites other than Bridgeport. The court granted that motion holding that the probative value of the other-site evidence was substantially outweighed by the danger of unfair prejudice, jury confusion, and undue waste of time. That ruling is also challenged on this appeal.

III. The Jury's Findings

After a three week trial, the jury found that Chemical Leaman was entitled to coverage under the Aetna and LMI policies as follows: the policies in effect from April 1, 1960 to April 1, 1971—for costs associated with the remediation of the soil; the policies in effect from April 1, 1961 to April 1, 1971—for the remediation of the wetlands; and the policies in effect from April 1, 1960 to April 1, 1981—for groundwater remediation. The jury also found that Chemical Leaman was entitled to defense costs that were incurred after April 18, 1988. The insurers challenge both the court's and jury's findings on appeal. The court instructed the jury that it had to find for Chemical Leaman unless it concluded that Chemical Leaman *subjectively* expected or intended to cause the pollution at the Bridgeport site. This charge is at the center of this appeal as the insurers argue that the appropriate inquiry is Chemical Leaman's objective expectation and intent. The insurers argue that, viewed objectively, the evidence established that the damage at Bridgeport was expected and/or intended by Chemical Leaman, and that there was therefore no accident or occurrence under the various policies.

Subsequent to oral argument but prior to our disposition of this appeal, Chemical Leaman and Aetna settled all of Chemical Leaman's environmental claims against Aetna, including the claims involved in this appeal. In accordance with the settlement agreement filed with this court, Aetna withdrew as a party to this appeal. LMI, however, was not a party to that

settlement agreement. Therefore, we must still address the issues raised as they pertain to LMI.[8]

Although LMI raises numerous issues, our inquiry focuses upon whether there has been an "accident" or "occurrence" as defined by the CGL policies.[9] Following the court's rulings on the post-trial motions, the New Jersey Supreme Court decided *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 134 N.J. 1, 629 A.2d 831 (1993).[10] We are guided by *Morton* and *Voorhees, supra.* Our review of the district court's interpretation and prediction of New Jersey law is plenary.[11] *See Wiley v. State Farm Fire & Casualty Co.*, 995 F.2d 457, 459 (3d Cir.1993).

[2] The parties agree that New Jersey law governs this dispute. It is also clear that we must apply state law as it exists today, even if the law may have changed since the judgment of the district court. *See Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941); *Air Products & Chemicals, Inc. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 181 (3d Cir.1994); *National Sur.*

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[8] Practically speaking, Aetna's withdrawal from this appeal has no effect on the issues which we must address since LMI and Aetna joined in each other's arguments.

[9] Aetna briefed the "occurrence" issue and LMI joined in and incorporated the arguments advanced by Aetna. *See* LMI brief at 50; LMI Reply brief at 1-2.

[10] The insurers also brought a motion for relief from judgment on the grounds of newly discovered evidence pursuant to Rule 60(b)(2) and/or on grounds of misconduct pursuant to Rule 60(b)(3). We need not reach this issue as the insurers will have the benefit of the "after discovered" documents at the new trial.

[11] The district court's subject matter jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The jurisdiction of this court is founded upon 28 U.S.C. § 1291. As a Federal Court sitting in diversity we are bound, as was the district court, to apply the substantive law of the state whose laws govern the action. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 613 (3d Cir.1992).

Corp. v. Midland Bank, 551 F.2d 21, 28 (3d Cir.1977). Thus, "intervening and conflicting state court decisions will [necessarily] cause the reversal of judgments which were correct when entered." *Baker v. Outboard Marine Corp.*, 595 F.2d 176, 182 (3d Cir.1979) (quoting Vandenbark, 311 U.S. at 543, 61 S.Ct. at 350). However, a brief discussion of the evolution of the law in this area will focus our analysis.

IV. New Jersey Law Before *Morton*

A. *Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Center, Inc.*[12]

In *Atlantic Employers*, parents of children who had allegedly been sexually abused sued the owners and operators of a day care center where the abuse purportedly took place. The company that insured the center then brought a declaratory judgment action to determine its obligation to defend or indemnify the owners for any recovery the plaintiffs might win in their personal injury suits based upon negligence and intentional tort.

The day care center's insurance policy insured against damage resulting from an "occurrence." An "occurrence" included injuries or damage that was "neither expected nor intended by the insured." *Atlantic Employers*, 571 A.2d at 303. The policy also contained an exclusion for violations of penal statutes or ordinances. The Appellate Division first noted the general rule that "coverage does exist ... 'for the unintended results of an intentional act, but not for damages assessed because of an injury intended to be inflicted.' " *Id.* (citation omitted). The court stated:

> There seems to be no dispute that if, ... Robert Knighton sexually molested the children, then he had the requisite level of intent to be found guilty of sexual molestation, based upon the criminal statutes

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[12] *Atlantic Employers v. Tots & Toddlers*, 239 N.J.Super. 276, 571 A.2d 300 (App.Div.), *cert. denied*, 122 N.J. 147, 584 A.2d 218 (1990).

> of this State. But appellants insist that this does not necessarily mean that he intended the damages or injuries incurred by the children as a result of such actions.... Further, they insist that the existence of such intent cannot automatically be imputed to the other insureds under the policy so as to exclude coverage.... We reject this position.

Id. The court then examined cases from other jurisdictions in order to analyze the insureds' argument in context with developing law. The court noted that some jurisdictions employed a subjective test in determining insurance coverage under these circumstances, and some rely upon an objective test. The court concluded that public policy mandated an objective approach.

> As a matter of public policy and logic we conclude that the better rule warrants application of the objective approach. A subjective test suggests that it is possible to molest a child and not cause some kind of injury, an unacceptable conclusion.... It is simply against public policy to indemnify a person for a loss incurred as a result of his[/her] own willful wrongdoing.

Id. at 304.

B. *Prudential Property & Casualty Ins. Co. v. Karlinski*[13]

Within a year and a half of *Atlantic Employers,* the Appellate Division decided *Karlinski.* There, insured's 13 year old son (James) had engaged in a prearranged fight with a 14 year old (Mark) in which Mark had fallen and suffered a broken hip. The court was asked to determine if a homeowner's policy obligated the plaintiff insurer to defend and indemnify the defendant. The policy excluded coverage for " 'bodily injury

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[13] *Prudential v. Karlinski,* 251 N.J.Super. 457, 598 A.2d 918 (App.Div.1991).

... which is expected or intended by the insured.'" *Karlinski,* 598 A.2d at 919. The motion court granted the insurer's motion for summary judgment noting, that the son of the insured " 'instigated the fight and threw the first blow and started the fight. As far as I am concerned, it is intentional conduct and the coverage doesn't apply.' " *Id.* The motion judge also concluded that "a broken 'leg' [Mark actually suffered a broken hip] was not an extraordinary consequence of the fight." *Id.*

On appeal the court aptly noted, "[t]his appeal requires that we again explore the frequently visited but still unclearly charted area of liability coverage for intentional torts which produce unintended results." *Id.* The court went on to observe:

> Our review of New Jersey authorities satisfies us that, ... it is difficult to ascertain a clear weight of authority on the subject of liability insurance coverage for unintended results of intentional acts. Differing combinations of variables, such as the language of the exclusion clause, the nature of the harm and its relationship to the intentional act, and the availability of relief to the injured party, appear to influence the extent to which our decisions have inquired into the nature of the intent.

Id. at 921. The court then stated:

> we hold that, when a coverage exclusion is expressed in terms of bodily injury expected or intended by the insured, and where the intentional act does not have an inherent probability of causing the degree of injury actually inflicted, a factual inquiry into the actual intent of the actor to cause that injury is necessary.

Id.

Thus, after *Karlinski,* a fact finder did not have to inquire into the actual (i.e. subjective) intent of the insured unless the damage that resulted from the insured's actions was not inherently probable. Accordingly, absent this improbability of

harm, the appropriate inquiry was the insured's objective intent.

C. *Voorhees v. Preferred Mutual Ins. Co.*[14]

In *Voorhees,* a parent was sued for statements she had made at a public meeting questioning the competency of her child's teacher. The teacher claimed she had suffered emotional distress and mental anguish as a result of the parent's conduct. The teacher alleged that the parent had acted "willfully, deliberately, recklessly and negligently," in making false accusations that had damaged the teacher professionally, and subjected her to public ridicule. *Voorhees,* 607 A.2d at 1257. Medical evidence established that the emotional distress the teacher complained of had resulted in " 'an undue amount of physical complaints,' including 'headaches, stomach pains, nausea, ... [and] body pains.' " *Id.* at 1258.

The parent had a homeowner's policy that provided coverage for liability arising from "bodily injury" caused by an "occurrence." The policy defined an "occurrence" as an "accident," and excluded coverage for bodily injury intentionally caused by the insured. The insurer relied upon this language and refused to defend the insured against the teacher's suit, asserting that the claims were based on the insured's intentional act and that the complaint sought damages for a "personal" rather than a "bodily" injury. The parent eventually sued her carrier for damages resulting from its refusal to provide a defense and indemnify her. Both parties moved for summary judgment.

The trial court granted the insurer's motion ruling that the complaint did not allege the kind of "bodily injury" that would be covered under the policy. A divided panel of the Appellate division reversed.

The New Jersey Supreme Court noted that the duty to defend under the policy was not triggered "absent a

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[14] 128 N.J. 165, 607 A.2d 1255 (1992).

potentially-coverable occurrence." *Id.* at 1262. In assessing whether the insured's statements constituted a potentially coverable occurrence, the court first held that "the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury." *Id.* at 1264. As to what constitutes an "intent to injure," the court noted that the general trend in the law appeared to require an inquiry into the actor's subjective intent to cause injury.

> We adhere to the prevalent New Jersey rule and hold that the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is "accidental," even if the act that caused the injury was intentional. That interpretation prevents those who intentionally cause harm from unjustly benefitting from insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrongdoing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.
>
> Even if the operative question is the intent to injure rather than to act, the question of what constitutes an "intent to injure" remains. The key issue is whether the court must find a subjective intent to injure, or whether it can presume an intent to injure from the objective circumstances. In that regard, our inquiry parallels that taken in interpreting policy exclusions for intentional acts. Those exclusions preclude coverage for injuries expected or intended by the insured. Case law interpreting those policy exclusions, in addition to that interpreting the definition of "occurrence," is thus relevant.
>
> The general trend appears to require an inquiry into the actor's subjective intent to cause injury. Even when the actions in question seem foolhardy

> and reckless, the courts have mandated an inquiry into the actor's subjective intent to cause injury.

Id. at 1264.

However, the court recognized that:

> [w]hen the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure. That objective approach focuses on the likelihood that an injury will result from an actor's behavior rather than on the wrongdoer's subjective state of mind.

Id. at 1265 (citing *Atlantic Employers, supra*). The *Voorhees* court reasoned that the insured's actions were a far cry from the type of egregious behavior that justified an objective approach in *Atlantic Employers*. The court held that "[a]bsent exceptional circumstances that objectively establish the insured's intent to injure," the insured's subjective intent to injure must govern. *Id.* While the court felt that there was little evidence that the insured subjectively intended or expected to injure the teacher, the court never had to address this question because the plaintiff had also alleged that the insured had acted negligently. The allegation of negligence presupposed the absence of a subjective intent to injure and stated a claim for a potentially coverable occurrence thus triggering the insurer's duty to defend. *See id.* Accordingly, the court affirmed plaintiff's award of summary judgment.

D. *SL Industries, Inc. v. American Motorists Ins. Co.*[15]

In *SL Industries,* an employee had filed suit against his employer alleging age discrimination and common law fraud as a result of the employer eliminating his position. The employee sought recovery for the alleged bodily injury that

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[15] 128 N.J. 188, 607 A.2d 1266 (1992).

resulted. The employer was insured under a policy in which the insurer agreed to defend and indemnify the employer for all sums resulting from a bodily injury caused by an "occurrence." "Occurrence" was defined as an "accident ... which results in bodily injury ... neither expected nor intended from the standpoint of the insured." *SL Industries,* 607 A.2d at 1269-70.

The employer settled the suit and then brought a declaratory judgment action against its insurer to establish its right to indemnification. The Law Division granted the insurer summary judgment, but the Appellate Division reversed, holding that although intended harm was not covered under the policy, the policy did provide coverage for the unforeseen results of intentional conduct. The court then remanded the case to the Law Division to determine whether the employee's emotional distress had been intended or whether it was foreseeable.

On appeal, the New Jersey Supreme Court had to determine if the general intent to injure that is inherent in a claim of fraud necessarily incorporates the intent to cause the specific injury (emotional distress), or whether proof of a subjective intent to cause the specific injury is required. *Id.* at 1277-1279. The court began its analysis of the required intent by examining the differing approaches taken by earlier cases.

> Our courts have taken different approaches to the question of how specifically the insured must have intended the resulting injury. Employing the "*Lyons*" test some courts have held that a subjective intent to injure ends the inquiry and precludes coverage. Under that approach, if there is a subjective intent to injure then any injury that results from the action will be deemed "intentional," even if the injury is different from or greater than that intended....[16]

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[16] The test derives its name from *Lyons v. Hartford Ins. Group,* 125 N.J.Super. 239, 310 A.2d 485, 488-89 (App.Div.1973).

On the other hand, some courts have indicated that to preclude coverage if the injury that actually occurred was not a probable outcome of the wrongful act is unfair. [citing *Prudential Property & Casualty Ins. Co. v. Karlinski*].... However, in those circumstances in which the facts indicate that the acts in which the insured engaged were unlikely to result in the degree or type of injury that in fact occurred, an inquiry into the subjective intent to cause the resulting injury is in order.

A third approach is even more likely to lead to coverage. In *Hanover Ins. Group v. Cameron,* 122 N.J.Super. 51, 298 A.2d 715 (Ch.Div.1973) the court rejected the insurance company's argument that to preclude coverage only the intent to harm need be demonstrated. The court indicated that "intent" would only be found when the actual consequences that resulted from the act were intended, or when the actor was substantially certain they would result.

To determine which approach to adopt, we refer to the general principles underlying the interpretation of insurance-policy provisions involving intentional conduct.

The *Lyons* test ... precludes coverage in some cases in which an insured could reasonably expect coverage. When the injury caused significantly exceeds the injury intended or expected and is an improbable consequence of the wrongful act that caused it, then it is hard to characterize the injury as truly "intentional." The injury, from the standpoint of the insured, is "accidental," and could thus be deemed an occurrence. Moreover, if the tortfeasor did not intend or expect to cause the resulting harm, denying coverage will not deter the harmful conduct. In that case, there is no policy justification for denying the victim the possibility of additional

> compensation. As the *Karlinski* court noted, precluding coverage "even if the actual harm far exceed[s] the consequences which might reasonably be expected by the insured ... diminishes the injured party's realistic possibility of recovery more than it impacts upon the insured tortfeasor."
>
> On the other hand, an approach allowing coverage whenever the adverse consequences intended by the tortfeasor did not precisely match the actual consequences of their wrongful actions undermines the basic policy against indemnifying wrongdoers.
>
> We believe the *Karlinski* test presents the most reasonable approach.... Assuming the wrongdoer subjectively intends or expects to cause some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was "accidental" and coverage will be provided.

Id. at 1277-78 (citations omitted). [Editor's Note: Citation added for the benefit of the researcher]

Accordingly, the court affirmed the Appellate Division's judgment remanding the case to the Law Division to determine whether the employee's emotional distress had been a probable outcome of the insured's general intent to injure, and if not, whether the insured subjectively had intended to cause the employee's actual injuries. *See id.* at 1279.

V. *Morton Int'l, Inc. v. General Accident Ins. Co.*[17]

In *Morton,* the New Jersey Supreme Court had to apply the evolving law of occurrence based insurance policies to injuries to the environment. There, the insured, Morton International, sued primary and excess CGL insurers seeking reimbursement for costs incurred in defending a suit filed by the Department of Environmental Protection (DEP), as well as indemnity for cleanup and remediation expenses resulting from the DEP proceeding. *Morton,* 629 A.2d at 834-835. Morton's predecessors, including Ventron Corporation, had polluted a body of water known as Berry's Creek to such an extent that "[f]or a stretch of several thousand feet, the concentration of mercury in Berry's Creek [was] the highest found in fresh water sediments in the world." *Id.* at 834. Morton's claims were derived from Ventron as well as other prior owners of the land. *See id.* The DEP sued Ventron and other prior owners to compel them to pay for remediating the pollution of Berry's Creek and the surrounding area. The environmental damage had been caused by discharges from a mercury-processing plant operated for forty years by the various defendants. *See New Jersey v. Ventron Corp.,* 94 N.J. 473, 468 A.2d 150 (1983).

In the underlying suit to establish liability, the New Jersey Supreme Court affirmed the Appellate Division's judgment holding the defendants jointly and severally liable. The court reasoned that the discharge of mercury constituted an abnormally dangerous activity, and imposed strict liability against all defendants. *See id.* at 160.

Morton then commenced a declaratory judgment action to determine its right to indemnification from the various insurers that had provided primary and excess coverage while the mercury-processing plant was in operation. The primary issue

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[17] 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied,* — U.S. —, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994).

that the court had to determine was whether the pollution resulted from an "occurrence" under the applicable policies. To qualify as an "occurrence" the environmental damage must not have been "expected nor intended from the standpoint of the insured." *Morton,* 629 A.2d at 836. The trial court granted the insurer's motion for summary judgment. The Appellate Division reversed holding that the trial court had "focused improperly upon the manner in which the injury had been caused and had erroneously concluded that the policy did not provide coverage for the unexpected result of a deliberate act." *Id.* at 877 (citation omitted).

The Appellate Division also relied upon *Atlantic Employers* to conclude that "[t]he intentional character of the act is the basis for the inference that the insured either intended or was manifestly indifferent to the prospect of injury." *Id.* (citation omitted). In reaching this conclusion, the Appellate Division (without the benefit of either *Voorhees* or *SL Industries*) noted that the "substantial environmental pollution over a long period" together with the knowledge by Morton's predecessors that "the substance being discharged ... was toxic and harmful" rendered unacceptable a conclusion that no harm had been expected." *Id.* (citation omitted).

On appeal to the New Jersey Supreme Court, Morton argued that the Appellate Division's reliance on *Atlantic Employers* improperly equated the discharge of pollutants with child molestation as acts that could be deemed intentionally injurious as a matter of law. Morton further argued that "the Appellate division improperly invoked an objective standard for determining whether harm had been intended or expected under the 'occurrence' based policies, ignoring the long-standing principle that coverage exists for the unintended results of intentional acts." *Id.*

The court began its analysis by acknowledging the unique circumstances that surround issues of insurance coverage for environmental damage.

> In applying our holding in *Voorhees* to claims seeking coverage for property-damage caused by

> environmental pollution under occurrence-based CGL policies, *we acknowledge the impracticality of adherence to the general rule* that "we will look to the insured's subjective intent to determine intent to injure." Although insureds may concede that pollutants—even known pollutants—had been intentionally discharged, those insureds are virtually certain to insist that the resultant harm was unintended and unexpected. *Absent "smoking gun" testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in environmental insurance coverage litigation.*
>
> We noted in *Voorhees* that an alternative to proof of subjective intent to injure existed in those cases in which the insured's "actions are particularly reprehensible, [so that] the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure." We cited *Atlantic Employers,* ... as illustrative of conduct that was so inherently injurious as to warrant the conclusion that intent to injure could be presumed.... We are unpersuaded that environmental-pollution litigation should generally be included in that category of cases, typified by *Atlantic Employers*, in which reprehensible conduct justifies a presumption that injury was intended.

Id. at 879 (citations omitted) (emphasis added).

Instead of establishing a general rule, the court called for an individualized inquiry based upon the facts of each case.

> [I]nsureds held responsible for remediation of environmental pollution vary significantly in their degree of culpability for the harm caused by pollutant discharges. A general rule in environmental-pollution coverage litigation that would permit intent to injure to be presumed simply on the basis of

> a knowing discharge of pollutants would be unjustified.
>
> Instead, *we hold that in environmental-coverage litigation a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, "exceptional circumstances [exist] that objectively establish the insured's intent to injure." Voorhees, supra,*

Id. at 879-80 (emphasis added). The term "exceptional circumstances" had been used in *Voorhees.* As noted above, there, the court stated that, absent exceptional circumstances, the subjective intent of the insured controlled whether there was an "occurrence" under an occurrence based insurance policy.

In *Morton,* the court defined those exceptional circumstances.

> Those circumstances include the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.

Id. at 880. It is important to note that even though these circumstances include "the existence of subjective knowledge concerning the possibility or likelihood of harm," that subjective knowledge is not used to definitively determine if the insured expected or intended environmental damage. Rather, the insured's subjective knowledge is but one of those "exceptional circumstances" that determine if an "occurrence" has taken place.

In a further effort to adopt prior law (particularly the holding in *Karlinski*) to environmental insurance coverage, the court noted that subjective evidence of the polluter's intent

did not become relevant merely because the extent of pollution was greater than anticipated.

> Turning to the question whether environmental injury was intended or expected, we first observe that although the magnitude of the damage to Berry's Creek and the surrounding areas may exceed any intention or expectation attributable to Morton's predecessors, we do not consider that differences in harm relating to the severity of environmental damage give rise to a finding of "improbability" of harm that invokes the need for evidence of subjective intent. *SL Industries, supra.* Whether Morton's predecessors anticipated that discharges of untreated effluent on the plant site and into Berry's Creek for more than forty years would cause environmental harm of the severity described ... hardly demonstrates that the extent of the injury was "improbable." The holding in *SL Industries* was based on the Appellate Division's ruling in *Karlinski,* that in a coverage action arising from a fight between two young teenagers in which one sustained a broken hip, a factual issue of subjective intent was presented because of the inherent improbability that the skirmish would result in a hip fracture. No such inherent "improbability" can be ascribed to the environmental damage attributable to Morton's predecessors.
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> *Id.* at 882 (citations omitted).

The court then reviewed the record to determine the extent to which it established the presence of "exceptional circumstances". The court noted, "[i]n determining whether in the context of this record the trial court properly concluded, as a matter of law, that Morton's predecessors had intended or expected environmental injury, we focus on those factors that we previously have identified to be significant." *Id.* The court concluded that exceptional circumstances established as a matter of law that there had been no occurrence as Morton's

predecessors had to have expected the pollution they caused. The objective nature of this conclusion is further evidenced by the court's clearly stating that it was not deciding whether Morton's predecessors "intended" the damage.

> We are thoroughly persuaded that summary judgment was properly granted, there being no material disputed facts concerning whether Morton's predecessors had expected to cause environmental damage to Berry's Creek and the surrounding area. Without determining that such damage was intended, we find inescapable the conclusion that damage qualitatively comparable to that found to exist in the Ventron litigation must have been anticipated by Morton's predecessors on the basis of their prolonged knowledge of and avoidance of compliance with complaints by regulatory officials that the company was discharging unacceptable emissions, including mercury compounds, into Berry's Creek. Based on that conclusion, we concur with both the trial court's and Appellate Division's determination that as a matter of law the property damage to Berry's Creek and the surrounding area was not caused by an "occurrence" within the meaning of the term in the various CGL policies.

Id. at 884.

VI. Chemical Leaman's Intent to Pollute

[3] Chemical Leaman asks us to hold that even under *Morton* its subjective intent to damage the environment must control. *See* Appellee's brief at 22. Chemical Leaman argues that "in order to constitute an 'exceptional circumstance' mandating a judicial finding of intent (rather than a trial on the subjective intent of the insured), the insured's conduct must be so 'reprehensible' and 'egregious' and 'so inherently injurious that [the resulting damage] can never be an accident.'" Appellee's brief at 21. This argument confuses "exceptional circumstances" with "reprehensible conduct", and can not withstand even a cursory examination of *Morton.*

The court in *Morton* specifically ruled that environmental pollution does not constitute the kind of "reprehensible conduct" that justifies finding an intent to harm as matter of law under *Atlantic Employers,* yet the court held that "exceptional circumstances" justified the finder of fact in concluding that Morton's predecessors intended or expected to harm the environment.

Moreover, the court explained that its approach was mandated by the reality that a polluter may well admit the acts that cause pollution but will almost never concede an intent to pollute. Accordingly, the court inquired into the presence of "exceptional circumstances" that would objectively establish the insured's intent to injure the environment in the absence of "smoking gun" proof of actual (subjective) intent.

[4] However, *Karlinski* remains even under *Morton,* and therefore, Chemical Leaman's subjective intent is still relevant if the extent of the environmental harm that it caused is found to be "improbable" or unforeseeable. *Morton,* 629 A.2d at 882 (citing *SL Industries,* 607 A.2d at 1278). If that is the case, there is still a covered "accident" or "occurrence" unless Chemical Leaman subjectively intended to cause that specific harm. *Id.* However, a subjective inquiry into Chemical Leaman's intent is not triggered merely because the "magnitude of the damage to [the Bridgeport area] may exceed [Chemical Leaman's] intention or expectation." *Id.* at 882.

[5, 6] A case by case analysis based on all the available evidence is required to determine whether "exceptional circumstances" objectively establish intent to injure. Although the insured's "objective intent" to injure can be decided as a matter of law if there are no disputed material issues of fact, we reject Chemical Leaman's argument that this "objective intent" to injure is a threshold issue that must be decided by a court as a matter of law. *See* Brief of Appellee at 21-22. If there are disputed issues of fact then the trier of fact must examine all the evidence and determine whether "exceptional circumstances" exist that objectively establish the insured's intent to injure.

The *Morton* factors should have been considered by the district court when ruling on the insurers' Rule 50(b) motion. Our review of the record establishes that exceptional circumstances establish as a matter of law that Chemical Leaman expected or intended environmental damage as of November 1968.[18]

A. The Duration of the Discharge.

[7] The first factor that we consider under *Morton* is the duration of the discharge. In *Morton* the discharge into Berry's Creek continued over a period of at least eighteen years, and perhaps as long as forty-five years. *Morton,* 629 A.2d at 882. Here, Chemical Leaman daily discharged its pollutants for 15 years before finally contracting with Du Pont. Throughout the time the pond and lagoon system was in use there were repeated discharges of waste through the overflow pipe to the adjacent swamp. In fact, the very purpose of the overflow pipe was to allow for discharges from the last pond to the swamp.

Inspector Robinson observed this discharge from the last pond during his September 12, 1961, visit and thereafter observed similar discharges on about half of his visits to the Bridgeport site. In November 1968 water pollution inspectors from the New Jersey Department of Health again observed the discharge from the overflow pipe in the last lagoon. Although it was characterized as a sporadic "trickle", Elston and Holman admitted that the overflow pipe did discharge into the swamp throughout the time the pond and lagoon system was in use.

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[18] *Morton* cautions against giving undue weight to "comparison[s] with analogous cases, because specific facts and circumstances inevitably determine whether ... proof of an occurrence has been established." *Morton,* 629 A.2d at 884. Nevertheless, the specific circumstances in *Morton* help to define the parameters of the exceptional circumstances test.

B. Was the Discharge Innocent or Deliberate?

In *Morton,* the court concluded that the discharge of pollutants was intentional once the polluters knew it was unacceptable. *Morton,* 629 A.2d at 882. There, the repeated demands of the Department of Health that the owner halt the discharges or install adequate treatment facilities were regularly ignored. *Id.*

Here, the intentional nature of the discharge is also evident. Chemical Leaman intentionally designed its waste treatment system so that the overflow pipe would discharge into the swamp. Moreover, even under the subjective framework that the jury was given to review the evidence, the jury concluded that Chemical Leaman's "overflow pipe" releases were intentional. That conclusion is supported by the record and Chemical Leaman cannot now successfully argue that the discharge was anything but intentional. Indeed, Chemical Leaman's protestations illustrate the concerns in *Morton* wherein the court stated that a polluter may admit to the discharge, but would never admit to intentionally polluting the environment.

Here, as in *Morton,* the intentional nature of the discharge is confirmed by Chemical Leaman's continued evasion of the State's demands to stop the discharge. The unacceptable condition of the discharge from the overflow pipe into the swamp was brought to Chemical Leaman's attention by Inspector Robinson in September 1961. Although Chemical Leaman installed three more lagoons in an attempt to alleviate this situation, the overflow pipe remained a staple of the Bridgeport site and in 1968 Chemical Leaman was discharging wastes into the lagoon in the same manner seven years later. Chemical Leaman intentionally discharged wastes into the swamp both before and after it knew that this practice was unacceptable.

C. Knowledge of the harmful propensities of the pollutants.

State officials regularly informed Chemical Leaman that the effluent flowing from the overflow pipe constituted an

unacceptable discharge into the swamp. In 1961, FGW told Chemical Leaman that the discharge was an unacceptable condition and that the resulting pollution should be stopped within a year. Subsequently, in 1968 the NJDOH told Chemical Leaman that "the waste emanating from the lagoon is highly pollutional and [that] immediate measures [should] be taken to eliminate this discharge or to sufficiently treat the waste prior to discharge" and in 1969 Chemical Leaman was ordered to find an alternative method of waste treatment.

Chemical Leaman argues that it was not aware of the harmful propensities of its pollutants because it was not discharging pure chemicals, but rather "trace amounts" of these chemicals in highly diluted rinsewater. However, the uncontroverted evidence clearly showed that at least by 1968 Chemical Leaman was alerted that the discharge into the swamp was "highly pollutional" even in its diluted form.

D. Efforts of Regulatory Authorities.

Chemical Leaman is more sympathetic than the polluters in *Morton* who engaged in a deliberate pattern of "stonewalling" characterized by promises of compliance that went unfulfilled. *Morton,* 629 A.2d at 882. Chemical Leaman apparently thought that its natural filtration system would reduce the danger of pollution. In fact, it was designed to do just that. Nevertheless, the record here also evidences a pattern of unfulfilled promises of compliance to state agency requests to abate the polluting discharge.

After Inspector Robinson's visit in 1961, Chemical Leaman promised to comply with his request to stop discharging waste from the overflow pipe into the swamp. Although Chemical Leaman attempted to alleviate this unacceptable situation by installing three more lagoons, and Inspector Robinson noted while on a return visit in 1962 that the seepage into the ground was a good sign, the overflow pipe remained an integral part of the waste treatment system.

Even after officials caught Chemical Leaman discharging into the swamp in 1968 and ordered it to find a better way to

treat wastes in 1969, Chemical Leaman never improved the waste treatment system until the summer of 1975, when the contract with Du Pont was entered into. In the interim, 40 to 50 million gallons of contaminated waste water had been processed using the same treatment system.

Thus, from 1961, when the State first notified Chemical Leaman that the discharge to the swamp was unacceptable, until 1975, when Chemical Leaman began off-site disposal at the Du Pont plant, Chemical Leaman responded to regulatory agencies with promises of compliance that went unfulfilled.

Because of *Morton's* command that we consider "all the available evidence" to determine whether exceptional circumstances exist that establish an objective intent to injure, we believe it both appropriate and necessary for us to also consider that the operation at Bridgeport was illegal from the very beginning. Chemical Leaman never obtained the required permits or other necessary approvals for the Bridgeport site. Indeed, this may well be the reason that it took the officials until September 1961 to discover the discharge to the swamp. If it were not for a local resident's complaint of dead fish in March 1961, it may have been years before the state stumbled upon the unacceptable discharges to the swamp.

Chemical Leaman argues it did not know it needed a permit and the absence of a permit is therefore irrelevant. However, compliance with regulatory agencies can not be so lightly dismissed. Moreover, Chemical Leaman's response to regulatory agencies once its treatment system became known is relevant, and that response is less than exemplary.

E. The Insured's Subjective Knowledge.

The final *Morton* factor which we must consider is the insured's subjective knowledge of the likelihood of harm. In *Morton,* the court held that the likelihood of harm could be inferred from the fact that the former plant owners were told that the effluent was unacceptable for discharge into Berry's Creek, yet repeatedly ignored demands for compliance. *Morton,* 629 A.2d at 882.

Similarly, Chemical Leaman was informed that the discharge to the swamp was unacceptable. Although the state did not articulate why the discharge was improper, it is difficult to imagine what other reason Chemical Leaman could have attributed to the state's concern if not the impact of the discharge upon the environment. Moreover, it is clear from Chemical Leaman's own argument in this regard that it never attempted to ascertain the reason for the State's concern.

Nevertheless, assuming *arguendo* that in 1961 Chemical Leaman could not ascertain that its system was damaging the environment, there is no dispute that Chemical Leaman learned that the discharges to the swamp were likely to cause harm as of November of 1968 when it was expressly told that "the waste emanating from the lagoon is highly pollutional and [that] immediate measures [should] be taken to eliminate this discharge or to sufficiently treat the waste prior to discharge." Even more telling is Harry Elston's concession at trial that both at the time of FGW's inspections in 1961 and 1962, and at the point when NJDOH issued its order in 1969, he knew that Chemical Leaman's discharge into the swamp was causing some damage to the swamp.

Chemical Leaman repeatedly asserts that it did not know of the possibility or likelihood of environmental harm because it designed, built and operated its waste treatment system to prevent environmental harm. However, Chemical Leaman discharged approximately 100 million gallons of contaminated waste water into its unlined ponds and lagoons for the 15 years that the Bridgeport site was in operation. The bottom of those lagoons was only two and a half feet above the groundwater, and the insurers' expert testified that the soil, groundwater and swamp contamination was the probable result of this discharge. That testimony was not refuted by Chemical Leaman's expert even though Chemical Leaman argues on appeal that their unlined treatment system was the state of the art.[19] Moreover, even assuming that Chemical

[19] Scholars who have taken a close look at this issue have concluded that industry was on full notice of the dangers of groundwater contamination.
(Footnote continued)

Leaman's mistaken belief that the soil was acting as a natural cleanser was held in good faith, that belief is only one factor that the fact finder must examine to determine Chemical Leaman's objective intent and expectation under *Morton*. At trial, Chemical Leaman's in-house expert, Harry Elston, conceded that he knew that the soil would not eliminate one hundred percent of the contaminants.

Although Chemical Leaman may have believed that the discharge was relatively clean because it emanated from the last pond, Elston's admission must be weighed along with the other *Morton* factors to determine the objective knowledge of Chemical Leaman insofar as the overflow pipe is concerned.

VII. Improbability of the Environmental Harm

Having found that Chemical Leaman intended to damage a portion of the environment as of November, 1968, we must determine what effect, if any, this has upon Chemical Leaman's right to coverage for damage to other parts of the environment before and after that date. Just as the severity of harm was not improbable though it may have exceeded any intention or expectation of Morton's predecessors, the severity of the damage here was not improbable. "[W]e do not consider that differences in harm relating to the severity of environmental damage give rise to a finding of 'improbability' of harm that invokes the need for evidence of subjective intent." *Morton*, 629 A.2d at 882.

See e.g., C.E. Colton, "A Historical Perspective on Industrial Wastes and Groundwater Contamination," 81 Geographical Rev. 215, 226 (1991) ("By the early 1950's, governmental agencies, professional organizations, and industry-trade associations ... recognized underground water ... could transport chemicals in solution across substantial distance," so that "the use of lagoons or infiltration ponds ... [for waste treatment was] unsafe and irresponsible in most environmental settings"). Moreover, a 1955 text warned that "seepage [from absorption lagoons] ultimately reaches a stream or an underground water stratum; hence absorption lagoons should not be employed for toxic wastes." Gurnham, *Principles of Industrial Waste Treatment* 319 (1955).

[8] The "severity of harm" that the *Morton* court was referring to was the enormous quantity of mercury that saturated Berry's Creek and the surrounding areas. However, while the *Morton* court did not elaborate on this point we believe that the "severity of the harm" can mean at least two very different things in the environmental pollution context. As *Morton* expressly held, the "severity of the harm" is the quantity of mercury or other pollutants in the land and water. However, the "severity of the harm" can also refer to the different components of the environment that are ultimately injured by the polluting process. "Determination of the magnitude of the damage includes recognition that the disposal of toxic waste may cause a variety of harms, including ground water contamination via leachate, surface water contamination via runoff or overflow, and poison via the food chain." *Ventron*, 468 A.2d at 159-160 (*citing*, Special Report to Congress, Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies in Compliance with section 301(e) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 By the Superfund Section 301(c) Study Group (reprinted as Comm. Print for the Senate Comm. on Envtl. & Pub. Works, Serial No. 97-12, 97th cong., 2d Sess. 1982)). Furthermore, the *Ventron* court noted that "the waste dumped may react synergistically with elements in the environment, or other waste elements, to form an even more toxic compound." *Id.* at 160 (citing, W. Stopford & L.J. Goldwater, "Methylmercury in the Environment, A Review of Current Understanding," 12 Envtl. Health Persp. 115-18 (1975)).

[9] In *Morton*, the insured was held to have objectively intended the damage to Berry's Creek *and the surrounding areas* and thus was not entitled to coverage for any of this damage under the CGL policies. Damage to the entire area was the probable result of dumping mercury into the creek. Chemical Leaman would have us parse out various components of the environment and individually determine its intent with regard to each even though each is an integral part of the whole. The court in *Morton* did not do this, and we see no reason for us to engage in such an unrealistic analysis. *See*

New Hampshire Ball Bearings v. Aetna Casualty & Sur. Co., 43 F.3d 749, 753 (1st Cir.1995) ("We have serious doubts that the intended injuries to the top soil and wetlands are divisible from the unintended injury to the groundwater.").

VIII. Summary of the Required Intent

[10, 11] The district court correctly concluded that the insured has the burden of proof on establishing coverage. Accordingly, Chemical Leaman must establish by a preponderance of the evidence that the environmental damage for which it seeks recovery is an "occurrence" or "accident" within the meaning of the applicable policies. To summarize, we hold that *Morton* requires that an objective standard be used in determining whether environmental damage was either "expected or intended from the viewpoint of the insured." The district court, acting without the benefit of the New Jersey Supreme Court's pronouncement on this issue erred in charging the jury that Chemical Leaman's subjective intent controlled, and a new trial is therefore required. If, after hearing the evidence, the factfinder concludes that exceptional circumstances exist that objectively establish that Chemical Leaman expected or intended to cause environmental damage there is no occurrence and no coverage under the applicable policy unless the extent of the damage was unforeseeable. If it is determined that the extent of the damage was unforeseeable there will still be coverage unless the factfinder concludes that Chemical Leaman subjectively intended or expected that the damage was likely to result from its activities.

Applying these principles to the record before us we find, as a matter law, Chemical Leaman expected or intended the damage it was causing to the environment as of November, 1968, and the damage was not improbable in view of Chemical Leaman's waste treatment system. Accordingly, beginning in November, 1968 there was no "occurrence" and Chemical Leaman is not entitled to coverage for damage after that period. However, we do not feel that the record sufficiently establishes the state of Chemical Leaman's knowledge or expectations before November, 1968, and we must therefore

remand to the district court for a factual determination of Chemical Leaman's objective expectations or intentions before November, 1968. Upon remand, if the factfinder conducts the appropriate inquiry and concludes that Chemical Leaman did not objectively expect or intend to cause the environmental damage that resulted from its waste treatment system during any portion of that period, Chemical Leaman is covered under the insurance policy applicable to such period. However, if the factfinder concludes that exceptional circumstances do establish that Chemical Leaman intended or expected environmental damage, there was no occurrence and no coverage for the applicable period unless the extent of that damage was unforeseeable.

If the factfinder determines that the damage was unforeseeable it must then determine if Chemical Leaman subjectively intended the specific damage that resulted from its practices.

IX. The Pollution Exclusion Clauses

LMI has also appealed the trial court's ruling as to the applicability of the Pollution Exclusion Clauses contained in Chemical Leaman's policies. However, the policies did not contain this exclusion until 1971. Since we hold that Chemical Leaman may not recover for any period after November, 1968, we need not reach this issue. However, several other issues must still be addressed.

X. Other-Site Evidence

[12] Before trial, Chemical Leaman made a motion *in limine* to exclude all evidence of any environmental problems at any Chemical Leaman site other than Bridgeport. The district court granted this motion under Federal Rule of Evidence 403 because the court found that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, jury confusion, and undue waste of time.

LMI argues that the district court abused its discretion by barring evidence of the environmental problems at other Chemical Leaman wastewater disposal sites. LMI argues that this evidence is relevant to show Chemical Leaman's

knowledge of injury at Bridgeport, and that it should have also been introduced to impeach Elston's testimony.[20] In denying the motion, the court stated:

> the jury would have to evaluate the various explanations offered by Chemical Leaman on why its knowledge of alleged problems at other sites did not translate into an expectation or intention that the rinsewater treatment system in Bridgeport would cause damage. These explanations include, among others, whether damage actually occurred at the other sites; and whether the geological and other conditions at the other sites were significantly different or substantially the same as at Bridgeport.

Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co., 817 F.Supp. 1136, 1140-41 (D.N.J.1993).

The court feared that a series of mini-trials would be necessary, and that this would spawn collateral inquiries that "would cause undue delay and mislead and confuse the jury as to its ultimate factual issue, namely the subjective expectations and intent of Chemical Leaman in respect to the Bridgeport site." *Id.* at 1140-41. This was a reasonable concern. However, the district court further noted that "evidence that Chemical Leaman was on notice that its design concept of unlined ponds and lagoons could cause soil, groundwater or swamp damage can be used by a jury to find that Chemical Leaman *should have known* that the rinsewater treatment system in Bridgeport would cause damage." *Id.* The court held that the danger that a jury may apply this objective standard constituted a danger of undue prejudice which further warranted exclusion of the other-site evidence. This objective standard is precisely the inquiry that is required.

---

[20] As LMI correctly notes, we review rulings on the admissibility of evidence for an abuse of discretion. *See Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83 (3d Cir.1986).

At oral argument before this court, the parties disputed the number of sites that were at issue and the number of witnesses needed to introduce this testimony. The district court must determine if the specific evidence that the insurers seek to introduce is so probative of Chemical Leaman's objective knowledge that it outweighs the court's other concerns. Under our reading of *Morton* the other-site evidence is more probative than it was under the subjective inquiry employed by the district court. Upon remand, the district court should again balance the competing considerations for admitting and excluding this evidence keeping in mind that it is relevant to Chemical Leaman's objective knowledge.

Since the district court is in a better position than this court to know the number of potential witnesses and exhibits, the complexity of the testimony, and the amount of trial time involved, it is in a better position than this court to conduct the Rule 403 balancing.

XI. Owned Property Exclusion

[13] Aetna's policies contain an "owned property exclusion" that excludes coverage for damage to property owned or occupied or used by the insured. While LMI's policies do not contain this exclusion, several pre-1968 LMI policies provide that they are subject to the same warranties, terms, and conditions as are contained in the policies of the primary insurers. Thus, Aetna's "owned property exclusion" is arguably applicable to these LMI policies. Therefore, we will address whether the "owned property exclusion" is a bar to coverage.

In granting Chemical Leaman's motion for partial summary judgment, the district court held that the "owned property exclusion does not bar coverage for remedial measures on Chemical Leaman's own property so long as those efforts are directed at correcting injury to the ground and surface water and neighboring private wells." *See Chemical Leaman*, 788 F.Supp. at 853. The court based its ruling on the fact that "the EPA has already determined that the Site was the primary source of the groundwater contamination in the vicinity of the

Bridgeport Terminal facility and that other private wells are threatened with contamination." *Id.*

On appeal LMI argues that the district court failed to recognize that the groundwater is the property of the surface landowner, not the state of New Jersey. Accordingly, it claims that the owned property exclusion bars coverage for the remediation of groundwater contamination at the Bridgeport site, even though directed at preventing further damage of third-party property.

The New Jersey Supreme Court has never addressed whether the state or the surface landowner owns the groundwater beneath the landowner's property. In *Reliance Ins. Co. v. Armstrong World Indus.*, 265 N.J.Super. 148, 625 A.2d 601, 608 (Law Div.1993), the Law Division held that "[t]he 'property interest' in groundwater is clearly an interest held by the owner of the recorded title of the surface land." There, unlike here, there was no evidence that the groundwater pollution had migrated and caused damage to groundwater outside the boundaries of the insured's property. Regardless of who owns the groundwater beneath the Bridgeport site, it is clear that the owned property exclusion does not apply to clean-up activities performed at the Bridgeport site to remedy or prevent damage to property owned by others. *See New Jersey v. Signo Trading Int'l, Inc.*, 130 N.J. 51, 612 A.2d 932, 938 (1992). In *Signo,* the New Jersey Supreme Court held that the owned property exclusion applies when there is no present damage to third-party property. However, the court went on to note that once there is some damage to third-party property coverage is available for clean-up activities performed on the insured's property to prevent further injury to the third-party property, as well as to remedy the existing damage to third-party property. *See id.* at 938-39.

The owned property exclusion barred coverage in *Signo* because "no present or past injury to property of a third party [had been] proven." *Id.* at 938-39. Here, LMI acknowledged that neighboring ground water wells have been contaminated. Moreover, numerous site investigation reports and the testi-

mony of expert hydrogeologists for both sides have confirmed that four neighboring water wells have been contaminated and at least three more are threatened by the groundwater contamination. Accordingly, coverage is available for clean-up that is necessary to remedy the existing damage to the neighboring groundwater wells, and to prevent further injury to other groundwater wells. Thus, we affirm the district court's grant of summary judgment.

XII. Continuous Trigger

[14] The time of an "occurrence" under a CGL policy is the time when the complaining party is damaged. *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974, 982 (1994). LMI challenges the district court's conclusion that the "continuous trigger" theory was the law of New Jersey. That theory basically provides that "where an injury process is not a definite discrete event, the date of the occurrence should be the continuous period from exposure to manifestation of damage." *Gottlieb v. Newark Ins. Co.*, 238 N.J.Super. 531, 570 A.2d 443, 445 (App.Div.1990). "[T]he term 'trigger' is merely a label for the event or events that under the terms of the insurance policy determines whether a policy must respond to a claim in a given set of circumstances." *Owens-Illinois*, 650 A.2d at 979. In the environmental pollution context, "[t]he conceptual underpinning of the continuous-trigger theory is that injury occurs during each phase of environmental contamination—exposure, exposure in residence (defined as further progression of injury even after initial exposure has ceased), and manifestation of disease." *Id.* at 981.

In its summary judgment motion before the district court, Chemical Leaman asserted that New Jersey endorses the continuous trigger theory, and that under this theory all of the insurers' policies are triggered from 1960 through 1985.

The district court held that under the continuous trigger theory, all insurance policies activated by an ongoing occurrence are jointly and severally liable to policy limits for all damages resulting from that occurrence, including damage

occurring before or after the policy period. However, the court held that:

> New Jersey law requires the insured to make two factual showings before imposing joint and several liability under the continuous trigger theory. First, the insured must establish that some kind of property damage occurred during each policy period for which the insured seeks coverage. Second, the insured must establish that the property damage was part of a continuous and indivisible process of injury.

Chemical Leaman, 817 F.Supp. at 1153-54.

Since each of these issues was disputed, the district court denied Chemical Leaman's motion for summary judgment. However, the court noted that if Chemical Leaman could establish these factual predicates at trial, all policies triggered by a continuous occurrence would be jointly and severally liable and the court charged the jury accordingly.

A.

[15] On appeal, LMI contends that New Jersey does not recognize the continuous trigger theory and thus, the court improperly charged the jury. Our review of jury instructions is plenary. *See Hook v. Ernst & Young,* 28 F.3d 366, 370 (3d Cir.1994). Our inquiry must focus upon "whether the charge taken as a whole fairly and adequately submits the issues in the case to the jury." *Id.*

[16] After the oral argument in this case the New Jersey Supreme Court rendered its decision in *Owens-Illinois, Inc. v. United Ins. Co., supra. Owens-Illinois* clearly establishes that the continuous trigger theory involving progressive indivisible injury or property damage is the law of New Jersey. However, New Jersey has rejected strict imposition of joint and several liability of insurers in favor of an alternative allocation of liability related to the degree of risk transferred or retained by the insured during the years of exposure. *See Owens-Illinois,* 650 A.2d at 993.

In *Owens-Illinois*, Owens-Illinois ("O-I"), a company that had manufactured insulation containing asbestos between 1948 and 1958, brought a declaratory judgment action against its two lead insurers seeking a declaration that they must provide coverage for numerous asbestos-related personal-injury and property-damage claims brought against O-I. "Between 1948 and 1963, O-I was self-insured; it maintained no insurance to cover its product liability losses but bore that risk itself." *Id.* at 976. From 1963 to 1977 O-I was insured under excess indemnity policies by Aetna. These policies contained a deductible, or "self-insured retention," for each occurrence resulting in personal injury or property damage. From 1977 to 1985, O-I had primary coverage with United Insurance Company and excess coverage from a captive insurance company that reinsured with various insurance companies. *See id.* at 976-77.

The New Jersey Supreme Court granted certification on two issues pertaining the insurance policies issued from 1977 to 1985: (1) the application of the continuous trigger theory, and (2) any consequent apportionment of liability. After an extensive survey of the applicable law, the court applied the continuous trigger theory to the claims of asbestos-related injury and property damage. The court held that "courts may reasonably treat the progressive injury or damage as an occurrence within each year of a CGL policy" when faced with a progressive, and indivisible injury. *Id.* at 995. Thus, the asbestos-related bodily injury and property damage claims triggered all applicable policies from initial exposure to the asbestos product through manifestation of asbestos-related disease or property damage. Although the court was concerned with personal injury, not environmentally related property damage, the court clearly stated that its analysis was analogous to the latter situation as the environment doesn't immediately manifest the effects of exposure. "Thus, while property damage is not, of course, an insidious disease, many of the same considerations apply." *Id.* at 983.

The court then relied in part upon *Keene Corp. v. Ins. Co. of North Am.*, 667 F.2d 1034 (D.C.Cir.1981), *cert. denied,*

455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982), to hold that the "triggered policies must respond to a claim on a prorated basis and that a policyholder is responsible for a portion of indemnification and defense obligations as a result of periods of time when it was uninsured or self-insured." *Id.* at 987.

Here, Chemical Leaman was insured by Aetna and LMI from the time the environment was first exposed to the hazardous substances until the damage became evident. It therefore retained no risks. Consequently, any liability resulting from a continuous "occurrence" or "accident" during this period should be borne solely by LMI subject only to policy limits and exclusions. *See id.* at 994. Thus, if after the new trial LMI is held liable under any of the triggered policies, the district court must conduct the alternative allocation of liability established in *Owens-Illinois,* and allocate the losses among the carriers on the basis of the extent of the risk assumed.

We hold that the district court correctly held that New Jersey recognizes the continuous trigger theory. However, when charging the jury the court should omit mention of joint and several liability. Instead, the policy limits of any triggered policies must be allocated in accordance with the formula established by *Owens-Illinois.*

B.

LMI argues that Chemical Leaman failed to prove property damage for each policy year from 1960-70, and that the district court therefore erred in: (1) granting summary judgment in favor of Chemical Leaman for the 1960-61 policy year, and (2) denying its motion for judgment as a matter of law with respect to the 1961-70 policy years. LMI also argues that the court erroneously instructed the jury on the meaning of "property damage" which, in turn, allowed the jury to find the existence of property damage without proof of actual environmental damage.

Each of these arguments presumes that New Jersey does not recognize the continuous trigger theory. In light of *Owens-Illinois,* these arguments are clearly without merit.

1. *1960-1961 policies*

[17] The district court found as a matter of law that groundwater and soil damage occurred in 1960, thus triggering the 1960-61 policies. The court based its conclusion on the fact that "contaminated rinsewater from the three settling ponds started migrating through the soil to underlying groundwater almost immediately after beginning pond operation in 1960." *Chemical Leaman,* 817 F.Supp. at 1148. Injury occurs during each phase of environmental contamination under the continuous trigger theory. Thus, an injury occurred as soon as the soil and groundwater were exposed to the contaminants in the rinsewater. The record reflects that the point of initial exposure was "immediately after beginning pond operation in 1960." Thus, we hold that the district court did not err in granting Chemical Leaman summary judgment with respect to the 1960-61 policies.

2. *1961-1970 policies*

Likewise, we hold that the district court did not err in denying the insurers' motion for judgment as a matter of law. The insurers argued that Chemical Leaman had not demonstrated that property damage occurred during each of the policy years between 1961-1970. On appeal, LMI contends that the lack of any pre-1970 evidence of soil or groundwater contamination demonstrates that the district court did not require Chemical Leaman to show damage-in-fact for each policy year. LMI maintains that this error resulted in the improper denial of their motion for judgment as a matter of law.

[18] As discussed above, under the continuous trigger theory the actual injury need not manifest itself in each and every policy year so long as there is a continuous, indivisible process resulting in damage. Thus, we affirm the district court's denial of the insurers' motion.

3. *Jury instruction on "property damage"*

[19] Over the insurers' objections, the district court instructed the jury on the meaning of "property damage" and the applicability of the continuous trigger as follows:

> *"PROPERTY DAMAGE"—DEFINED*
>
> In order for Chemical Leaman to obtain basic coverage under defendants' insurance policies, you, the jury, must determine whether or not property damage occurred at the Bridgeport site during the relevant periods. Property damage in the context of this case means physical injury to the soil, the groundwater and/or the wetlands at or about the Bridgeport site.
>
> You are instructed that as to the policy year April 1, 1960, to April 1, 1961, the Court has already ruled as a matter of law, that property damage to soil and groundwater took place.
>
> *"CONTINUOUS TRIGGER DOCTRINE"*
>
> Under New Jersey law, Chemical Leaman may be entitled to coverage under the defendants' insurance policies for property damage that occurs during a policy period, but that originally began during an earlier policy period....

On appeal, LMI argues that:

> [this] jury charge, in light of the evidence, could not fairly apprise the jury of what constitutes "property damage" consistent with New Jersey's requirement of damage-in-fact, unless the charge defined "property damage" to mean "actual injury" and required the jury to find "new property damage" to each environmental medium during each policy period for which coverage was sought.

LMI's Brief at 40.

Under the continuous trigger theory the jury could find that property damage occurred during a policy period if there was proof that an indivisible injurious process took place during the policy period, regardless of when the actual environmental injury became manifest. Thus, the district court's jury charge was not erroneous.

XIII. Late Notice

[20] Chemical Leaman concedes that it did not comply with the notice requirement in the policies, and LMI argues that this omission relieves them from any obligation to provide coverage.

The district court relied upon *Morales v. National Grange Mut. Ins. Co.*, 176 N.J.Super. 347, 423 A.2d 325 (Law Div.1980), to hold that Chemical Leaman was entitled to coverage despite the absence of notice.

> It is ... beyond dispute that notice should have been given to defendants, at the earliest, by 1984, when the EPA placed the Bridgeport site on the Superfund national priorities list. The court finds that the evidence in the record fails to establish that defendants suffered a likelihood of appreciable prejudice in their ability to contest coverage.... The insurers have not submitted proof that they would have been in any better position to make this case beginning in 1984 upon timely notice....

Chemical Leaman, 817 F.Supp. at 1158-59.

The court also examined whether the delayed notice had impacted upon "the likelihood of success of the insurer in defending against the underlying claim." The court noted that:

> Chemical Leaman, as an owner and operator of the Bridgeport facility, is strictly liable under CERCLA for damages for injury to, destruction of, or loss of natural resources, as well as for the reasonable costs of assessing such damage to natural resources, and all costs of removal, remediation, or other necessary

> response costs. Chemical Leaman's liability for these damages is retroactive, joint, and several, and imposed regardless of fault. Defendants do not contend that a meritorious challenge exists to the findings, made in the 1985 consent order.... Nor do defendants assert that there is a meritorious defense to the EPA's allegation that the presence of hazardous substances at the Bridgeport facility and their migration to surrounding soils and groundwater constitute a release within the meaning of section 101(22) of CERCLA, 42 U.S.C. § 9601(22). Accordingly, the court finds that defendants have not shown a likelihood of success in defending Chemical Leaman against claims under CERCLA.

Id. at 1159 (citation omitted). Since prejudice was not demonstrated, the district court ruled that the late notice did not bar recovery.

LMI does not now dispute that it must prove that it suffered a likelihood of appreciable prejudice. However, it suggests that the New Jersey Supreme Court would not adopt the two prong *Morales* test for appreciable prejudice employed by the district court.

LMI does not cite to any New Jersey case in which this test has been rejected, or in which a different standard has been applied. We have previously recognized that the *Morales* test is consistent with the purpose of the prejudice requirement, that is, "to allow an insurer to refuse payment only if its procedural handicap has led to disadvantageous, substantive results—in other words, if the insured's violation of its contract has proximately caused its insurer damages." *Trustees of the University of Pennsylvania v. Lexington Ins. Co.*, 815 F.2d 890, 898-99 (3d Cir.1987). Several courts applying New Jersey law have adopted the *Morales* test of appreciable prejudice in environmental coverage cases. *See Continental Ins. Co. v. Beecham, Inc.*, 836 F.Supp. 1027, 1047-48 (D.N.J.1993); *Hatco v. W.R. Grace & Co.*, 801 F.Supp. 1334,

1371-72 (D.N.J.1992); *Witco Corp. v. Travelers Indem. Co.*, Civ. 86-2997, 1987 WL 65060 (D.N.J. May 1, 1987).

"Although lower state court decisions are not controlling on an issue on which the highest court of the state has not spoken, federal courts must attribute significant weight to these decisions in the absence of any indication that the highest state court would rule otherwise." *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273-74 (3d Cir.1985). We do not think the Supreme Court of New Jersey would reject this 15 year old test. Accordingly, we find that the district court correctly relied upon *Morales* in ruling that the absence of timely notice does not bar recovery.

XIV.

For the foregoing reasons, we will reverse and remand for proceedings consistent with this opinion.

SCIRICA, Circuit Judge, dissenting.

Despite having rendered its opinion before the New Jersey Supreme Court's opinion in *Morton Int'l, Inc. v. General Accident Ins. Co.*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, — U.S. ——, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994), the district court correctly required the insurers to prove that Chemical Leaman subjectively expected or intended to cause the environmental harm for which it sought coverage. The New Jersey Supreme Court has recognized only a limited exception to the requirement that an insurer must prove its insured subjectively expected or intended to cause harm in order to deny coverage under an occurrence based insurance policy. Because I believe the majority has broadened that exception beyond what was contemplated by the New Jersey Supreme Court and has misapplied it to hold, as a matter of law, that Chemical Leaman intended or expected to cause the resultant environmental injury, I respectfully dissent.

In *Morton*, the New Jersey Supreme Court cautioned that courts may, as a matter of law, find objective intent to cause environmental harm only in "exceptional circumstances". The court defined those circumstances to include:

> whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.

Morton, 629 A.2d at 880. As the majority acknowledges, "a general rule in environmental coverage litigation that would permit intent to injure to be presumed simply on the basis of a knowing discharge of pollutants would be unjustified." *Opinion* at 672 (citing *Morton,* 629 A.2d at 879-80). Rather, a court may presume intent to injure only where insureds have engaged in "particularly reprehensible" conduct. *Morton,* 629 A.2d at 879.

The New Jersey Supreme Court recognized that "insureds held responsible for remediation of environmental pollution vary significantly in their degree of culpability." *Id.* Therefore, the court designed the "exceptional circumstances" test to apply to only the most egregious conduct and the worst polluters. This much is apparent from the court's use of child sexual abuse as an illustration of conduct that is "so inherently injurious" as to warrant a presumption of intent to injure. *Id.*

Morton is instructive in considering the level of culpability required to allow intent to injure to be presumed in the environmental context. As the majority recognizes, "the specific circumstances in *Morton* help to define the parameters of the exceptional circumstances test." *Opinion* at note 18. In *Morton,* the insured intentionally discharged mercury-laden compounds directly into streams over a lengthy period of time. The Department of Health and state engineers made repeated demands for compliance and the insured consistently disregarded its own promises to remediate the discharge. *Morton,* 629 A.2d at 882. "[T]he record fairly reflect[ed] a pattern of 'stonewalling' on the part of [the insured], characterized by

promises of compliance that consistently were unfulfilled." *Id.*

There is no "pattern of stonewalling" under the facts in this case. On the contrary, a fact finder could conclude that Chemical Leaman's behavior suggests a good faith effort at compliance with agency demands. Chemical Leaman initially designed the Bridgeport wastewater treatment system to purify contaminated rinseate. "Apparently, the designers of the system believed that the sandy bottom of the unlined ponds would purify the contaminated rinsewater by acting as a kind of natural filter...." *Opinion* at 662. The overflow pipe "was apparently intended as a safety valve to prevent a rupture in the berms" which would have resulted in a massive loss of rinsewater in the event of a heavy rain. *Id.* at 662.

In September 1961, an inspector from the Pollution Unit of the New Jersey Division of Fish, Game & Wildlife advised Chemical Leaman of an unsatisfactory discharge into a neighboring swamp. Chemical Leaman responded by constructing a second set of lagoons and the final settling lagoon. *Id.* at 664. The majority refers to no further agency demands until seven years later, when water pollution inspectors from the New Jersey Department of Health concluded that discharges from the lagoon were "highly pollutional" and, in February 1969, ordered Chemical Leaman to submit plans for a system to properly treat the effluent. *Id.* In May 1969, Chemical Leaman submitted a plan for a new rinsewater treatment system. The New Jersey Department of Health rejected this plan and over the next four years the parties attempted to resolve their dispute until January 1974, when they entered into a consent judgment. *Id.* at 665.

This history can hardly be described as "a pattern of 'stonewalling' ... characterized by promises of compliance that consistently were unfulfilled." *Morton,* 629 A.2d at 882. Despite its acknowledgment that *Morton* rejected a rule permitting "intent to injure to be presumed simply on the basis of a knowing discharge of pollutants," *Opinion* at 672 (citing *Morton,* 629 A.2d at 879-80), the majority has

concluded that "a sporadic trickle," amounting to a "fraction of an inch" of discharge from the overflow pipe, *id.* at 662, warrants presumption of an intent to cause environmental damage. The exceptional circumstances that warranted such a presumption in *Morton* do not apply here, and I fear today's holding has broadened the parameters of the "exceptional circumstances" test beyond what the New Jersey Supreme Court intended. I would affirm.

Not for Publication

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHEMICAL LEAMAN TANK LINES, INC.,	:	
Plaintiff,	:	Civil Action, No. 89-1543: SSB
v.	:	**OPINION**
AETNA CASUALTY AND SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyds, London, *et al.*,	:	
Defendants.	:	

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Robin Anthony Gildart Jackson, *et al.*

BROTMAN, District Judge.

On April 5, 1993, this court denied defendants' motion, made at the end of trial pursuant to *Fed. R. Civ. P. 50(a)* for judgment as a matter of law. On April 22, 1992 this court issued an opinion explaining its reasons for denying defendants' Rule 50(a) motion. Presently before the court is defendants' renewed motion for judgment as a matter of law pursuant to *Fed. R. Civ. P.* 50(b), or in the alternative, motion for a new trial pursuant to *Fed. R. Civ. P.* 59. For the following reasons, the motion is denied.

I. Standard of Review

Rule 50(b) provides in relevant part:

> Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry

> of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative.

The standards for granting a motion for judgment as a matter of law after the verdict are the same as those for granting the motion before the verdict. *See Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989). Accordingly, a Rule 50(b) motion, like a 50(a) motion, "'should be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no question of material fact for the jury, and any verdict other than the one directed would be erroneous under the governing law.'" *Getty v. Resolution Trust Corp.*, 937 F.2d 899, 915 (3d Cir. 1991) (quoting *Macleary v. Hines*, 817 F.2d 1081, 1083 (3d Cir. 1987)).

A motion for a new trial pursuant to Rule 59 may be granted, this court has previously held, "when the verdict is against the great weight of the evidence, when the court has committed any prejudicial error of law, or for any other equitable reason." *Pepe v. Jayne*, 761 F. Supp. 338, 341 (D.N.J.), *aff'd*, 947 F.2d 936 (3d Cir. 1991). The court, however, must "'abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result.'" *Marley v. City of Allentown*, 774 F. Supp. 343, 345 (E.D. Pa. 1991) (citations omitted), *aff'd*, 961 F.2d 1567 (3d Cir. 1992).

II. Discussion

A. Issues Relating to Renewed Motion for Judgment as a Matter of Law

Defendants make five arguments in support of their renewed motion for judgment as a matter of law:

> (1) That Chemical Leaman's failure to obtain a permit to operate its treatment system at the Bridgeport site constituted reprehensible conduct from which an intention or expectation to pollute should have been presumed as a matter of law;

(2) That, if Chemical Leaman expected or intended any environmental pollution at the site, coverage is precluded in accordance with *SL Industries v. American Motorists Insurance Company*, 138 N.J. 188 (1992);

(3) That the pollution exclusion clause in defendants' post-April 1, 19?? policies precludes coverage for groundwater contamination;

(4) That public policy prohibits coverage for the environmental damage at issue;

(5) That plaintiff failed to carry its burden of proof to show the existence of property damage at the site.

This court considered and rejected the first four of these arguments in its opinion filed April 22, 1993, and sees no reason to alter the conclusions previously reached. In regard to the pollution exclusion, defendants base their argument on grounds that were not presented in their Rule 50(a) motion. Courts may not grant Rule 50(b) motions on grounds not advanced in a pre-verdict motion. *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989). As such, this court refrains from considering the pollution exclusion argument as refashioned by defendants.

In regard to defendants fifth argument, viewing the evidence in the light most favorable to the plaintiff, it cannot be said that there was no question of material fact on the issue of property damage. This court concludes that the testimony of Dr. McLane, in conjunction with the deposition testimony of Mr. Elston as relied upon by Dr. McLane, constituted sufficient evidence relating to property damage to warrant jury consideration.

B. Issues Relating to Motion for a New Trial

Defendants raise three issues in support of this alternative motion:

(1) That the court committed prejudicial error in instructing the jury on the "expected or intended" standard;

(2) That the court improperly excluded probative evidence to the substantial prejudice of defendants;

(3) That the court committed prejudicial error in allocating the burden of proof on the pollution exclusion.

The court finds no prejudicial error in relation to any of these contentions. In regard to the "expected or intended standard," defendants argue that the court's instruction to the jury--in sum, that insurance coverage is precluded only where the polluter expected or intended the specific property damage giving rise to the litigation--departed from the three-tier approach set out in *SL Industries*.[1] In that case, the New Jersey Supreme Court held that a specific intent inquiry is appropriate only after it is determined that the insured intended "some sort of injury," but that the extent of injuries actually incurred was "improbable." 128 N.J. at 212.

The thrust of defendant's contention is that the court did not allow the jury the opportunity to find that plaintiff did expect or intend *some* damage to the environment and that the *resulting* damage was not improbable, a finding which would remove the need for a specific intent requirement. This court previously found, however, that, "under *SL Industries*, there is sufficient evidence in the record to establish that the actual damages for which Chemical Leaman now seeks coverage...were an improbable consequence of the[ ] discharges from the overflow pipe." *See Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, No. 89 Civ. 1543 (D.N.J. Apr. 22, 1993), at 9. The court having thus determined that evidence of improbability existed, in accordance with *SL*

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[1] This court basically addressed the merits of this argument in its opinion of April 22, 1993, but for clarity's sake the court has chosen to more fully discuss it herein.

Industries it was proper to put to the jury the question of "whether the insured subjectively intended or expected to cause" the actual damages in question. *SL Industries*, 128 N.J. at 212. There was no prejudice to defendants as a result of this instruction.[2]

Defendant's second argument, relating to the exclusion of certain evidence, has been fully considered and rejected previously both before and during trial. This court determined that any value attributable to the evidence, which concerned sites other than Bridgeport, was substantially outweighed by the danger of prejudice, jury confusion, and undue delay. *See Chemical Leaman Tank Lines Inc. v. Aetna Casualty & Sur. Co.*, No. 89 Civ. 1543 (D.N.J. Mar. 17 1993); Trial Transcript at 786-87. The court stands on its earlier reasoning and reaffirms its position that the exclusion of this evidence was proper; no prejudicial error occurred as a result.

Defendant's final argument is also unavailing. Placement of the burden of proof in regard to the "sudden and accidental" exception to the pollution exclusion is an open question in this state, as defendants concede. Plaintiff rightly observes, however, that the Third Circuit has recently articulated sound policy grounds for assigning the burden to the insurer. *See New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1182 (3d Cir. 1990) (recognizing "traditional distinction between coverage clauses and exclusionary clauses" in relation to allocating "Respective burdens of proof"). This court concurs with the *New Castle* court's rationale, and accordingly finds that assigning the burden of proof to defendants on this issue did not constitute prejudicial error.

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[2] That the court, rather than the jury, determined that evidence of improbability was put forward is, in this court's view, of no legal significance, let alone prejudicial error. In their reply brief at page 18, defendants inaccurately suggest that this court's April 22 opinion "at 9 equally acknowledged the *SL Industries* requirement of a *jury* determination of 'inherent probability.'" Defendants have put words in this court's mouth; there is no such acknowledgment.

III. Conclusion

For the foregoing reasons, the court denies defendants' renewed motion for judgment as a matter of law, or in the alternative, motion for a new trial.

An appropriate order will be entered.

/s/ Stanley S. Brotman

Stanley S. Brotman, Senior Judge
United States District Court

DATED: November 5, 1993.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CHEMICAL LEAMAN TANK LINES, INC.,	:	Civil Action, No. 89-1543: SSB
Plaintiff,	:	**ORDER DENYING RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL**
v.	:	
AETNA CASUALTY AND SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyds, London, *et al.*,	:	
Defendants.	:	
	x	

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WILLIAM T. WALSH, CLERK

This matter having come before the court on the renewed motion of the defendants for judgment as a matter of law or in the alternative motion for anew trial pursuant to Federal Rules of Civil Procedure 50(b) and 59;

The court having considered the submissions of the parties; and

For the reasons stated in the court's opinion of this date;

IT IS on this 5th day of November 1993 hereby

ORDERED that defendants' renewed motion for judgment as a matter of law or in the alternative motion for a new trial is **DENIED.**

No costs.

/s/ Stanley S. Brotman

Stanley S. Brotman, Senior Judge
United States District Court

Not For Publication

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHEMICAL LEAMAN TANK LINES, INC.,	:	
Plaintiff,	:	Civil Action. No. 89-1543
v.	:	(SSB)
AETNA CASUALTY AND SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyds, London, *et al.*,	:	**OPINION**
Defendants.	:	

x

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BROTMAN, District Judge.

On April 5, 1993, the court ruled on the parties' motions, made at the end of trial pursuant to Federal Rule of Civil Procedure 50(a) for judgment as a matter of law. The following opinion represents the court's reasoning for its ruling.

I. Introduction

Rule 50(a) states:

> (1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under

the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before the submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Fed. R. Civ. P. 50(a). A Rule 50(a) motion "'should be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no question of material fact for the jury, and any verdict other than the one directed would be erroneous under the governing law.'" *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 915 (3d Cir. 1991) (quoting *Macleary v. Hines*, 817 F.2d 1081, 1083 (3d Cir. 1987)). "The courts are reluctant to grant a judgment as a matter of law in favor of the party having the burden of persuasion. However, if such a party produces unimpeached and uncontradicted evidence to prove a claim and the opposing party produces no evidence to disprove it, the court should grant judgment as a matter of law prior to the verdict." 5A *Moore's Federal Practice* ¶ 50.02[1], at 38-39.

II. Discussion

A. Plaintiff's Motions

Plaintiff moves for judgment as a matter of law on three issues:

(1) That property damage occurred during each policy period between 1960 and 1981 under defendants' insurance policies;

(2) That the "continuous trigger" doctrine affords Chemical Leaman coverage under defendants' insurance policies in effect between 1960 and 1981; and

(3) That the owned-property exclusion does not preclude coverage for costs incurred or to be incurred in the future for the remediation of soil under defendants' insurance policies in effect between 1960 and 1981.[1]

The court discusses each issue in turn.

1. Property Damage

The court has already ruled that property damage occurred to soil and groundwater during the policy period April 1, 1960 to April 1, 1961. *See* Summary Judgment Opinion, March 12, 1993, at 26 (hereinafter "Opinion"). The court finds that, apart from this period, it is for the jury to weigh the evidence presented at trial and to decide whether property damage with respect to soil and groundwater. Further, the jury must evaluate the evidence presented at trial to determine whether property damage occurred with respect to the wetlands during all the relevant policy periods. The court, therefore, holds that plaintiff has not satisfied its burden under Rule 50(a) with respect to property damage to soil, groundwater, and wetlands, and denies plaintiff's motion in this regard.

2. Continuous Trigger

Similarly, the court finds that plaintiff has not satisfied its burden under Rule 50(a) with respect to the issue of whether the damage occurring during each policy period was part of a continuous and indivisible process of damage for the purpose of invoking the continuous trigger doctrine. This issue must be determined by the jury, and the court denies plaintiff's motion in this regard as well.

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[1] Plaintiff also moves for a ruling that the owned-property exclusion does not bar coverage for remediation costs for groundwater and wetlands damage. However, defendants conceded this point during oral argument on this motion.

3. Owned-Property Exclusion

Finally, plaintiff asks for judgment as a matter of law on defendants' defense based on the owned-property exclusion. Having reviewed the record of the trial, the court finds that defendants have introduced no evidence upon which a reasonable jury could conclude that part of the costs for the soil contamination cleanup are being used to remediate Chemical Leaman's own property. Defendants bear the burden of proof on this issue because it is an exclusion to coverage. *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 399 (1970). Accordingly, the court holds that defendants are not entitled to a jury instruction on this issue, and that judgment must be entered as a matter of law that the owned-property exclusion in defendants' policies does not operate to exclude coverage in the present case.

B. Defendants' Motions

Defendants' motion for judgment as a matter of law concerns six issues:

(1) That this case is governed by "reprehensible conduct" rule articulated in *Vorhees v. Preferred Mutual Insurance Co.*, 128 N.J. 165 (1992);

(2) That the governing standard for determining Chemical Leaman's "expectations or intentions" in causing property damage is supplied by *SL Industries v. American Motorists Insurance Co.*, 128 N.J. 188 (1992);

(3) That public policy requires the entry of judgment in defendants' favor;

(4) That Chemical Leaman expected or intended to cause soil damage during the policy periods April 1, 1960 to April 1, 1971;

(5) That the pollution exclusion clause precludes recovery for remediation of groundwater

damage on the policies in effect from April 1, 1971 to April 1, 1981; and

(6) That Chemical Leaman expected or intended to cause groundwater damage during the policy periods April 1, 1960 to April 1, 1981.

The court addresses each of defendants' motions in turn.

1. The *Vorhees* Reprehensible Rule

Under *Vorhees v. Preferred Mutual Insurance Co.*, 128 N.J. 165 (1992), where "exceptional circumstances" are present that "objectively establish the insured's intent to injure," the trier of fact may presume the insured's intent "from the act without an inquiry into the actor's subjective intent." *Id.* at 184. These exception circumstances arise when the insured's "actions are particularly reprehensible." *Id.* at 185.

Defendants argue that the evidence adduced at trial warrants application of the *Vorhees* rule. This court has already ruled that plaintiff's use of unlined ponds and lagoons does not suffice to trigger the *Vorhees* rule. Opinion at 20-22. In support of its present Rule 50(a) motion, defendants put forth two further grounds: first that Chemical Leaman operated the Bridgeport terminal in violation of New Jersey penal statutes for its discharging practices and for failing to get a permit; and second that the record contains evidence that at least one of the lagoons was cut directly into the groundwater table.

The court holds that these arguments still do not suffice to require the application of the *Vorhees* rule. As discussed in this court's summary judgment opinion, the case of sexual abuse of children represents the paradigm example for presuming the insured's subjective intent to cause a particular kind of damage from the insured's intent to perform the acts that cause that damage. Opinion at 19. In the environmental pollution context, the objective approach has been followed only where it was beyond dispute that the insured knowingly and intentionally was "[t]hrowing toxic waste out into the meadowlands." *Morton Int'l v. General Accident Ins. Co. of Am.*, No. A-895-89T3, 1991 WL 348049 at *16 (N.J. Super.

App. Div. Oct. 2, 1991), *certif. granted*, 127 N.J. 563 (1992). In this case, there is abundant evidence that Chemical Leaman attempted to process waste at the Bridgeport site, even if it was in violation of particular state regulations. In addition, the record is clearly in dispute on whether the lagoons cut directly into the groundwater table, and this is a fact that must be determined by the jury. Accordingly, the *Vorhees* rule does not apply. Plaintiff is entitled to get to the jury under the subjective standard.

2. The *SL Industries* Test Governing Subjective Intent to Injure

Defendants argue that they are entitled to judgment as a matter of law on all of plaintiff's claims for coverage under the test for determining intent to cause injury articulated in *SL Industries v. American Motorists Insurance Co.*, 128 N.J. 188 (1992). In *SL Industries*, the court addressed "whether *any* intent to injure will render the resulting injury intentional, whether the wrongdoer must intend the *specific* injury that results, or whether there is some middle ground between the two approaches." *Id.* at 209. After extensive analysis, the court adopted the middle ground by formulating a two-step test. The first step is to determine whether the insured "subjectively intends or expects to cause some sort of injury." *Id.* at 212. If this is the case, then coverage will generally be precluded, unless "there is evidence that the extent of the Injuries was improbable." *Id.* If evidence exists showing the improbability of the extent of the injuries, then "the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was accidental' and coverage will be provided." *Id.* Defendants argue that the evidence introduced during trial leaves no reasonable doubt that Chemical Leaman had a general subjective intent to injure, and that under *SL Industries*, defendants are entitled to judgment as a matter of law.

The court disagrees. Resolution of this question requires a close reading of the Supreme Court's analysis in *SL Industries*. As discussed above, the first step under *SL Industries* is

a determination of whether Chemical Leaman subjectively intended or expected to cause some sort of injury. This issue, of course, is the heart of the present case. Both sides have pre sented considerable evidence over the course ofthis three-week trial on the subjective intentions and expectations of Chemical Leaman. Whether there was any intentor expectation on the part of Chemical Leaman to damage the soil, groundwater, and wetlands at the Bridgeport site is a disputed fact issue, whose resolution may be adjudicated only by the jury.

There is a second ground for denying defendants' motion with respect to *SL Industries*. Even assuming, *arguendo*, that the evidence is not in dispute that Chemical Leaman expected or intended to cause some kind of damage at the Bridgeport site, *SL Industries* requires an investigation into Chemical Leaman's expectations or intentions in causing the specific damage for which it now seeks insurance coverage so long as "there is evidence that the extent of the injuries was improbable." 128 N.J. at 212. Thus, "in those circumstances in which the facts indicate that the acts in which the insured engaged were unlikely to result in the degree or type of injury that in fact occurred, an inquiry into the subjective intent to cause the resulting injury is in order." *Id.* at 210; *see also id.* (quoting *Prudential Property & Casualty Ins. Co. v. Karlinski*, 251 N.J. Super. 457, 464 (App. Div. 1991)) ("'where the intentional act does not have an inherent probability of causing the degree of injury actually inflicted, a factual inquiry into the actual intent of the actor to cause that *injury* is necessary'").

In the present case, defendants contend that the record supports a conclusion that Chemical Leaman expected and intended to cause some type of damage to the swamp as a result of the discharges coming from the overflow pipe in the rinsewater treatment system. However, even assuming this fact, the court finds that, under *SL Industries*, there is sufficient evidence in the record to establish that the actual damages for which Chemical Leaman now seeks coverage -- *ie.* soil, groundwater, and wetlands -- were an improbable consequence of these discharges from the overflow pipe.

Accordingly, *SL Industries* directs this court to allow the jury to determine subjectively expected or intended to cause those specific damages for which it now seeks insurance coverage. Defendants' motion for a judgment as a matter of law based on *SL Industries* is therefore denied.

3. Public Policy

Defendants further argue that because plaintiff violated state regulations and law in its operation of the rinsewater treatment system in Bridgeport, public policy requires that coverage be denied as a matter of law. The court finds that this argument is essentially a replay of the *Vorhees* argument made above, and denies defendants' motion for the same reasons.

4. Expectation or Intention to Cause Soil Damage

Defendants next move for judgment as a matter of law that plaintiff expected or intended to cause damage to the soil at the Bridgeport site. The court has already established as a fact that "Chemical Leaman knew that the contaminants it placed into the rinsewater treatment system were seeping into the soil." Rule 56(d) Order, March 16, 1993, at ¶ 19. However, the court, in its summary judgment opinion, explicitly left open the question of Chemical Leaman's expectations and intention with respect to causing permanent damage to the soil. Opinion at 36-37; *see also* Order, March 16, 1993 (amending summary judgment Opinion). If plaintiff had no such expectations or intentions, then recovery is still possible. The court's review of the evidence at trial reveals that plaintiff has proffered sufficient evidence on this matter to reach the jury. Defendants' motion is, therefore, denied.

5. Pollution Exclusion for Groundwater Damage

This motion is based on the evidence presented by defendants that one or more of the lagoons cut directly into the groundwater table. If this contention were undisputed on the present trial record, then the court could hold as a matter of law that Chemical Leaman expected or intended to discharge contaminants into the groundwater, thus triggering the appli-

cation of the pollution exclusion for all attempts at recovery for cleaning up groundwater damage. However, as ruled above, the issue of whether one or more of the lagoons at the Bridgeport site cut directly into the groundwater table is a disputed factual issue on which the parties have presented conflicting evidence. This question must, therefore, go to the jury for resolution. Accordingly, the court denies defendants' motion for judgment as a matter of law on the pollution exclusion for groundwater.

6. Expectation or Intention to Cause Groundwater Damage

Defendants final argument is that judgment as a matter of law should be granted on Chemical Leaman's expectations or intentions to cause groundwater damage. The basis for this motion is, again, the evidence that one or more of the lagoons cut directly into the groundwater table. This remains in dispute, and therefore defendants' motion is denied.

III. Conclusion

For the foregoing reasons, the court denies in part and grants in part plaintiff's motion for judgment as a matter of law. The only portion of plaintiff's motion that is granted is with respect to the owned-property exclusion. The court also denies in its entirety defendants' motion for judgment as a matter of law.

An appropriate order will be entered.

/s/ Stanley S. Brotman

Stanley S. Brotman
United States District Judge

DATED: April 22, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHEMICAL LEAMAN TANK LINES, INC.,	:	Civil Action. No. 89-1543 (SSB)
Plaintiff,	:	**ORDER**
v.	:	
AETNA CASUALTY AND SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyds, London, *et al.*,	:	
Defendants.	:	
	x	

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WILLIAM T. WALSH, CLERK

This matter having come before the court on the motions of the parties for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a);

The court having considered the submissions of the parties and oral argument; and

For the reasons stated in the court's opinion of this date;

IT IS on this 22nd day of April 1993 hereby

ORDERED that plaintiff's motion for judgment as a matter of law is GRANTED in part and DENIED in part in that:

(1) plaintiff's motion for judgment as a matter of law that property damage occurred during each

policy period between 1960 and 1981 under defendants' insurance policies is DENIED; and

(2) plaintiff's motion for judgment as a matter of law that the "continuous trigger" doctrine affords Chemical Leaman coverage under defendants' insurance policies in effect between 1960 and 1981 is DENIED; and

(3) plaintiff's motion for judgment as a matter of law that the owned-property exclusion does not preclude coverage for costs incurred or to be incurred in the future for the remediation of soil under defendants' insurance policies in effect between 1960 and 1981 is GRANTED; and

IT IS FURTHER ORDERED that defendants' motion for judgment as a matter of law is DENIED.

No costs.

/s/ Stanley S. Brotman

Stanley S. Brotman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEW JERSEY

CHEMICAL LEAMAN TANK LINES, INC.,	:	
Plaintiff,	:	Civil Action No. 89-1543(SSB)
v.	:	
AETNA CASUALTY & SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyd's, London, *et al.*,	:	Judge Stanley S. Brotman (Filed Apr 7, 1993)
Defendants.	:	

x

JUDGMENT ORDER

Based upon the jury's verdict in the above captioned-matter, rendered on April 7, 1993, it is on this 7th day of April 1993 hereby

ORDERED, ADJUDGED, and DECREED that Chemical Leaman Tank Lines, Inc. ("Chemical Leaman"), is entitled to indemnification and reimbursement from defendants Aetna Casualty & Surety Company ("Aetna") and the London Market Insurers under each and every policy of insurance they provided to Chemical Leaman during the period April 1, 1960 to April 1, 1971 for the full amount of any and all costs of investigating and remediating soil contamination at and in the vicinity of its Bridgeport, New Jersey, tank truck terminal resulting from the United States Environmental Protection Agency's claims against Chemical Leaman. Each insurer that provided coverage to Chemical Leaman during that period is jointly and severally liable in accordance with the limits of its policy for the entire amount of investigation and remedial costs referred to in the preceding sentence, including investigation and remedial costs for damage occurring before and after a specific policy year; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Chemical Leaman is entitled to indemnification and reimbursement from defendants Aetna and the London Market Insurers under each and every policy of insurance they provided to Chemical Leaman during the period April 1, 1960 to April 1, 1981 for the full amount of any and all costs of investigating and remediating groundwater contamination at and in the vicinity of its Bridgeport, New Jersey, tank truck terminal resulting from the United States Environmental Protection Agency's claims against Chemical Leaman. Each insurer that provided coverage to Chemical Leaman during that period is jointly and severally liable in accordance with the limits of its policy for the entire amount of investigation and remedial costs referred to in the preceding sentence, including investigation and remedial costs for damage occurring before and after a specific policy year; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Chemical Leaman is entitled to indemnification and reimbursement from defendants Aetna and the London Market Insurers under each and every policy of insurance they provided to Chemical Leaman during the period April 1, 1961 to April 1, 1971 for the full amount of any and all costs of investigating and remediating wetlands contamination at and in the vicinity of its Bridgeport, New Jersey tank truck terminal resulting from the United States Environmental Protection Agency's claims against Chemical Leaman. Each insurer that provided coverage to Chemical Leaman during that period is jointly and severally liable in accordance with the limits of its policy for the entire amount of investigation and remedial costs referred to in the preceding sentence, including investigation and remedial costs for damage occurring before and after a specific policy year; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Chemical Leaman is entitled to receive from defendant Aetna reimbursement for and future payment of any and all defense costs incurred after April 18, 1988 or to be incurred in connection with the investigation and remediation of soil, groundwater, and wetlands contamination at and in the

vicinity of its Bridgeport, New Jersey, tank truck terminal resulting from the United States of Environmental Protection Agency's claims against Chemical Leaman; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Chemical Leaman shall have the right to designate the policy or policies under which it seeks the indemnity, reimbursement and/or defense costs, to the extent that same is consistent with the preceeding provisions of this Judgment Order.

/s/ Stanley S. Brotman

Stanley S. Brotman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEW JERSEY

CHEMICAL LEAMAN TANK LINES, INC.,	:	
Plaintiff,	:	Civil Action No. 89-1543(SSB)
v.	:	
AETNA CASUALTY & SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyd's, London, *et al.*,	:	Clerk William T. Walsh
Defendants.	:	Filed Apr. 7, 1993

INTERROGATORIES

PLACE AN "X" IN THE APPROPRIATE BOX

INTERROGATORY NO. 1: BASIC COVERAGE FOR SOIL CLEANUP COSTS

A. Property Damage

Do you find by a preponderance of the evidence that property damage to soil occurred in each of following policy years? (The Court has already found that property damage to soil occurred in the policy year April 1, 1960 to April 1, 1961.)

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	

April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	

B. Continuous and Indivisible Process of Damage

For each policy year in which property damage to soil occurred, do you find by a preponderance of the evidence that it occurred as part of a continuous and indivisible process?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961	X	
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	

April 1, 1970 to April 1, 1971	X	

C. Expectations

For each policy year in which property damage to soil occurred, do you find by a preponderance of the evidence that Chemical Leaman did not *expect* to cause that damage at the time that it occurred?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961	X	
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	

D. Intentions

For each policy year in which property damage to soil occurred, do you find by a preponderance of the evidence that Chemical Leaman did not *intend* to cause that damage at the time that it occurred?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961	X	
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	

INTERROGATORY NO. 2: BASIC COVERAGE FOR GROUNDWATER CLEANUP COSTS

A. Property Damage

Do you find by a preponderance of the evidence that property damage to groundwater occurred in each of following policy years? (The court has already found that property damage to groundwater occurred in the policy year April 1, 1960 to April 1, 1961.)

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	

April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979	X	
April 1, 1979 to April 1, 1980	X	
April 1, 1980 to April 1, 1981	X	

B. Continuous and Indivisible Process of Damage

For each policy year in which property damage to groundwater occurred, do you find by a preponderance of the evidence that it occurred as part of a continuous and indivisible process?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961	X	

April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979	X	
April 1, 1979 to April 1, 1980	X	
April 1, 1980 to April 1, 1981	X	

C. Expectations

For each policy year in which property damage to groundwater occurred, do you find by a preponderance of the evidence that Chemical Leaman did not *expect* to cause that damage at the time that it occurred?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961	X	
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979	X	
April 1, 1979 to April 1, 1980	X	
April 1, 1980 to April 1, 1981	X	

D. Intentions

For each policy year in which property damage to groundwater occurred, do you find by a preponderance of the evidence that Chemical Leaman did not *intend* to cause that damage at the time that it occurred?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961	X	
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	

April 1, 1978 to April 1, 1979	X	
April 1, 1979 to April 1, 1980	X	
April 1, 1980 to April 1, 1981	X	

INTERROGATORY NO. 3. BASIC COVERAGE FOR WETLANDS CLEANUP COSTS

A. Property Damage

Do you find by a preponderance of the evidence that property damage to wetlands occurred in each of following policy years?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961		X
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	

April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979		X
April 1, 1979 to April 1, 1980		X
April 1, 1980 to April 1, 1981		X

B. Continuous and Indivisible Process of Damage

For each policy year in which you find property damage to wetlands occurred, do you find by a preponderance of the evidence that it occurred as part of a continuous and indivisible process?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	**No**
April 1, 1960 to April 1, 1961		
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	

April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April I, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979		
April 1, 1979 to April 1, 1980		
April 1, 1980 to April 1, 1981		

C. Expectations

For each policy year in which you find property damage to wetlands occurred, do you find by a preponderance of the evidence that Chemical Leaman did not *expect* to cause that damage at the time that it occurred?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	**No**
April 1, 1960 to April 1, 1961		
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	
April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	

April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979		
April 1, 1979 to April 1, 1980		
April 1, 1980 to April 1, 1981		

D. Intentions

For each policy year in which you find property damage to wetlands occurred, do you find by a preponderance of the evidence that Chemical Leaman did not *intend* to cause that damage at the time that it occurred?

A "YES" answer is a finding for Chemical Leaman
A "NO" answer is a finding for defendant insurers

	Yes	No
April 1, 1960 to April 1, 1961		
April 1, 1961 to April 1, 1962	X	
April 1, 1962 to April 1, 1963	X	
April 1, 1963 to April 1, 1964	X	
April 1, 1964 to April 1, 1965	X	

April 1, 1965 to April 1, 1966	X	
April 1, 1966 to April 1, 1967	X	
April 1, 1967 to April 1, 1968	X	
April 1, 1968 to April 1, 1969	X	
April 1, 1969 to April 1, 1970	X	
April 1, 1970 to April 1, 1971	X	
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979		
April 1, 1979 to April 1, 1980		
April 1, 1980 to April 1, 1981		

INTERROGATORY NO. 4. POLLUTION EXCLUSION

A. Groundwater

1. Do you find by a preponderance of the evidence that Chemical Leaman *expected* to discharge pollutants into the groundwater at the Bridgeport site in each of the following policy years?

A "YES" answer is a finding for defendant insurers
A "NO" answer is a finding for Chemical Leaman

	Yes	No
April 1, 1971 to April 1, 1972		X

April 1, 1972 to April 1, 1973	____	X
April 1, 1973 to April 1, 1974	____	X
April 1, 1974 to April 1, 1975	____	X
April 1, 1975 to April 1, 1976	____	X
April 1, 1976 to April 1, 1977	____	X
April 1, 1977 to April 1, 1978	____	X
April 1, 1978 to April 1, 1979	____	X
April 1, 1979 to April 1, 1980	____	X
April 1, 1980 to April 1, 1981	____	X

2. Do you find by a preponderance of the evidence that Chemical Leaman *intended* to discharge pollutants into the groundwater at the Bridgeport site in each of the following policy years?

A "YES" answer is a finding for defendant insurers
A "NO" answer is a finding for Chemical Leaman

	Yes	**No**
April 1, 1971 to April 1, 1972	____	X
April 1, 1972 to April 1, 1973	____	X
April 1, 1973 to April 1, 1974	____	X
April 1, 1974 to April 1, 1975	____	X
April 1, 1975 to April 1, 1976	____	X
April 1, 1976 to April 1, 1977	____	X
April 1, 1977 to April 1, 1978	____	X
April 1, 1978 to April 1, 1979	____	X
April 1, 1979 to April 1, 1980	____	X
April 1, 1980 to April 1, 1981	____	X

B. Wetlands

1. Do you find by a preponderance of the evidence that Chemical Leaman *expected* to discharge into the wetlands the pollutants that have caused any current property damage at the Bridgeport site in each of the following policy years?

A "YES" answer is a finding for defendant insurers
A "NO" answer is a finding for Chemical Leaman

	Yes	No
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	
April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979		X
April 1, 1979 to April 1, 1980		X
April 1, 1980 to April 1, 1981		X

2. Do you find by a preponderance of the evidence that Chemical Leaman *intended* to discharge into the wetlands the pollutants that have caused any current property damage at the Bridgeport site in each of the following policy years?

A "YES" answer is a finding for defendant insurers
A "NO" answer is a finding for Chemical Leaman

	Yes	No
April 1, 1971 to April 1, 1972	X	
April 1, 1972 to April 1, 1973	X	

April 1, 1973 to April 1, 1974	X	
April 1, 1974 to April 1, 1975	X	
April 1, 1975 to April 1, 1976	X	
April 1, 1976 to April 1, 1977	X	
April 1, 1977 to April 1, 1978	X	
April 1, 1978 to April 1, 1979		X
April 1, 1979 to April 1, 1980		X
April 1, 1980 to April 1, 1981		X

YOUR DELIBERATIONS ARE NOW COMPLETE.

/s/ James A. Eberwine #201547

JAMES A. EBERWINE
FOREPERSON

DATED: April 7, 1993.

CHEMICAL LEAMAN TANK LINES, INC., Plaintiff,

v.

AETNA CASUALTY AND SURETY CO., Robin Anthony Gildart Jackson, an Underwriter at Lloyds, London, et al., Defendants.

Civ. A. No. 89-1543 (SSB).

United States District Court,
D. New Jersey.

March 12, 1993.

As Amended March 16, 1993.

Insured brought action against insurer to recover costs it was incurring in cleaning up environmental site. After granting summary judgment in favor of insured on issues that New Jersey law governed the contract, that cleanup costs constituted property damage, and that owned property exclusion did not apply to measures designed to correct injury in ground and surface waters in the vicinity of the site, 788 F.Supp. 846, the District Court, Brotman, J., held that: (1) insured had the burden of proving that an occurrence which was not expected or intended gave rise to liability; (2) genuine issue of fact existed with respect to intent; (3) continuous trigger theory was applicable; (4) pollution exclusion precluded recovery for damage due to soil contamination; and (5) insurers did not show prejudice from late notice.

Motions for summary judgment granted in part and denied in part.

1. Federal Civil Procedure k2547.1

Although it is to be preferred, nothing in local rule requires that statement of material facts not in dispute contain citation to the record. U.S.Dist.Ct.Rules D.N.J., Rule 12, subd. G.

2. Insurance k437.1(1), k514.21(1)

Under New Jersey law, party seeking coverage bears the burden of bringing its claim within the basic terms of the policy, but it is the insurer that carries the burden of proving that the loss comes within a policy exclusion.

3. Insurance k433(2), k437.1(1)

Entire definition of "occurrence" in comprehensive general liability policy constituted the grant of basic coverage under the policy, and insured bore the burden of proving all of the elements of the definition of "occurrence," including that the occurrence was not expected and did not cause damage that was intended.

4. Insurance k155

Policy's drafting history is irrelevant where court finds policy language to be clear and unambiguous.

5. Damages k20

Individual who intentionally performs particular act will be liable for damage caused by the act, so long as the damage is foreseeable and probable result.

6. Insurance k434(1)

Insured who intentionally performs act that causes damage may be entitled to coverage, so long as insured did not intend to cause the damage, and carrier may be held liable for coverage for unintentional result of insured's intentional act.

7. Insurance k434(1)

Inquiry with respect to insured's intent, for purposes of determining whether there was an "occurrence" within the meaning of comprehensive general liability policy, focused on insured's intent to cause soil and groundwater damage which it was obligated to remediate, not its intent to place contaminated water in ponds and lagoons at its site.

8. Insurance k437.1(1)

Under the "particularly-reprehensible-act exception," trier of fact may presume from insured's intentional acts which caused damage that insured intended to cause the particular resulting damage.

See publication Words and Phrases for other judicial constructions and definitions.

9. Insurance k434(1)

Insured's actions in placing contaminated rinse water into unlined pools and lagoons was not so reprehensible as to permit jury to find intent to cause contamination from the mere fact of the insured's act.

10. Insurance k434(1)

Term "accident" as used in comprehensive general liability policy was ambiguous and would be given meaning which would provide coverage for long-term soil and groundwater contamination process.

See publication Words and Phrases for other judicial constructions and definitions.

11. Evidence k66

Jury could infer from person's professional standing as sanitary engineer that he had actual knowledge of state-of-the-art scientific knowledge.

12. Federal Civil Procedure k2501

Genuine issue of fact as to whether insured knew of groundwater contamination which it was causing, so that the contamination would not be an "occurrence" within meaning of comprehensive general liability policy, was presented by evidence of the state of the art for handling contaminated water during the period in question, evidence of steps which insured undertook to treat water, and evidence of standard practice in the industry.

13. Insurance k178.6

New Jersey law permits application of "continuous trigger theory," under which all policies activated by ongoing occurrence are jointly and severally liable, to policy limits, for all damages resulting from that occurrence, including damage that may have occurred before and after the policy period.

See publication Words and Phrases for other judicial constructions and definitions.

14. Insurance k178.6

In order for insured to invoke continuous trigger theory, insured must establish that some kind of property damage occurred during each policy period in which it seeks coverage and must establish that property damage was part of continuous and indivisible process of injury.

15. Insurance k178.6

Insurer may defeat insured's recovery under policy activated by continuous trigger theory if insurer establishes that applicable policy exclusion bars coverage.

16. Insurance k433(2)

Term "sudden" as used in pollution exclusion from comprehensive general liability policy is ambiguous because it may or may not include a temporal element.

17. Insurance k155

Even if evidence of drafter's intent would clearly show particular meaning of policy, doctrine of "contra proferentum," or "against the one who proffers" precludes court from considering the evidence.

See publication Words and Phrases for other judicial constructions and definitions.

18. Insurance k146.8

In insurance law, doctrine of "contra proferentum" provides that, where term in policy is ambiguous, giving rise to two equally plausible interpretations, term will be given meaning that results in coverage.

19. Insurance k155

Size or sophistication of insured is irrelevant under New Jersey law to application of rule of contra proferentum when policy has been drafted solely by carrier.

20. Insurance k433(2)

Long-term environmental pollution occurrence falls within exception to pollution exclusion clause for occurrences that are sudden and accidental, so long as it was neither expected nor intended by the insured.

21. Insurance k433(2)

Pollution exclusion in comprehensive general liability policy precludes coverage where insured has caused discharge of contaminants or pollutants, unless discharge was neither expected nor intended from standpoint of insured.

22. Insurance k434(1)

Soil contamination resulting from rinse water used by insured fell within pollution exclusion to comprehensive general liability policy where insured contemplated discharges of rinse water into unlined ponds and lagoons as part of its treatment system.

23. Equity k72(1)

Under New Jersey law, defense of laches is identical to the defense of late notice and requires showing of prejudice, as does the estoppel defense.

24. Insurance k539.8

Insurers did not show prejudice from insured's four to five-year delay in providing notice of claims under comprehensive general liability policies and umbrella policy for damage caused by pollution where there was no showing that any material witnesses had died between the time that notice should have been given and the time that notice was given or that any witness' memory had faded so as to irretrievably harm the ability of the insurers to advance their case.

25. Insurance k539.8

Insurers did not show that late notice by insured of claim under comprehensive general liability policies and umbrella policy for environmental cleanup costs prejudiced the insurers by adversely affecting the likelihood of success in defending the underlying claim, which was based on strict liability.

26. Insurance k514.21(2), 539.8

Evidence that cleanup work performed for insured at environmental site was substandard, resulting in increased costs, did not show prejudice to insurers from insured's delay in giving notice of claim under comprehensive general liability and umbrella policy for cleanup costs, but it could be considered in determining the amount of cleanup costs for which the insurers were liable.

27. Insurance k514.17(10)

Under New Jersey law, insurer may disclaim coverage pursuant to cooperation clause only if it proves that the insured breached the corporation clause and that the carrier suffered likelihood of appreciable prejudice as a result of the breach.

28. Insurance k514.17(10)

Insurer did not show prejudice from any failure of insured to cooperate between the time it gave notice of claim, on March 30, 1989, and the time that it filed suit against the insurer, on April 12, 1989.

29. Insurance k539.7

Insurer could not be held responsible for insured's defense costs prior to the time that it received notice of the claim.

30. Insurance k514.9(1), k514.13(2)

Under New Jersey law, insurer may refrain from actually defending insured in underlying litigation where underlying litigation will not resolve issue central to coverage, but insurer must later reimburse insured if insured prevails on coverage question.

31. Insurance k514.9(1), k514.13(2)

Resolution of claim against insured for environmental cleanup costs would not resolve issue of insured's intent, which was central to issue of coverage, so that insurer was not required to defend insured, although it would be liable to reimburse insured should coverage issue be resolved in favor of insured.

Stuart M. Feinblatt, Philip A. Bramson, Sills Cummis Zuckerman Radin Tischman Epstein & Gross, Newark, NJ, Kevin B. Clark, Willkie Farr & Gallagher, Washington, DC, for plaintiff Chemical Leaman Tank Lines, Inc.

Peter E. Mueller, and Brian J. Coyle, Harwood Lloyd, Hackensack, NJ, for defendant Aetná Cas. & Sur. Co.

William J. Hanley, Ronca McDonald & Hanley, Livingston, NJ, Henry Lee, Hannah O'Driscoll, Mendes & Mount, New York City, for defendants Robin Anthony Gildart Jackson, et al.

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OPINION

BROTMAN, District Judge.

Presently before the court are the cross-motions for summary judgment of plaintiff Chemical Leaman Tank Lines, Inc. ("Chemical Leaman"), defendant Aetna Casualty and Surety Co. ("Aetna"), and the London market insurers Robin Anthony Gildart Jackson, *et al.* ("LMI"). The parties raise a plethora of legal and factual issues for the court's resolution.

I. Introduction

A. *Background and Procedure*

In this diversity action, Chemical Leaman seeks a declaratory judgment that defendant Aetna must provide coverage under certain comprehensive general liability ("CGL") policies and that LMI must provide coverage under certain umbrella and excess liability insurance policies for environmental costs connected to the environmental cleanup of Chemical Leaman's Bridgeport, New Jersey, facility.

Chemical Leaman is a tank truck company specializing in the transportation of various chemicals and other liquids. Chemical Leaman used the Bridgeport site from at least 1960 to 1985 to clean trucks. From 1960 to 1969, Chemical Leaman placed contaminated rinsewater at its Bridgeport facility into a wastewater treatment system consisting of unlined ponds and lagoons. In 1969, the New Jersey Department of Health responded to community complaints about bad odors and ordered Chemical Leaman to construct a wastewater treatment and/or disposal plant. Chemical Leaman continued to use the pond and lagoons system until 1975, when it installed a water treatment system. By 1977, Chemical Leaman had drained the ponds and lagoons of liquid, dredged the accumulated sludge out of the lagoons, and filled all the ponds and lagoons with brickbat, sand, and concrete.

In 1981, the New Jersey Department of Environmental Protection ("DEP") ordered Chemical Leaman to investigate the extent and degree of groundwater contamination at and around the Bridgeport site. The investigation revealed that the ponds and lagoons were the primary source of groundwater contamination. In 1984, the federal Environmental Protection Agency ("EPA") placed the site on the Superfund national priorities list pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liabilities Act ("CERCLA"). 42 U.S.C. § 9605. The EPA alleged that Chemical Leaman is strictly liable for damages and cleanup costs resulting from the onsite contamination. In July 1985, Chemical Leaman entered into a consent order with the EPA. Chemical Leaman admitted liability under CERCLA and agreed to undertake a Remedial Investigation and Feasibility Study ("RI/FS") of the groundwater. Chemical Leaman incurred expenses in performing the RI/FS and is further obligated to pay for all costs of removal or remedial action incurred by the United States or the state of New Jersey, as well as for damages for injury to, destruction of, or loss of natural resources.

On or about April 18, 1988, Chemical Leaman gave notice to Aetna of claims under its applicable CGL policies. On or about March 30, 1989, Chemical Leaman notified LMI. The defendants have refused to defend or indemnify Chemical Leaman for costs already incurred or to be incurred in the future in connection with the cleanup of the Bridgeport site. Chemical Leaman filed the present suit on April 12, 1989. The court understands plaintiff's claims to be limited to coverage for its liabilities resulting from the EPA's suit under CERCLA.

On March 31, 1992, the court granted partial summary judgment in favor of Chemical Leaman on the following issues:

1. New Jersey law governs the construction and interpretation of all the insurance policies involved in the litigation;

2. The cleanup costs which Chemical Leaman is obligated to pay pursuant to CERCLA with respect to ground and surface water contamination in the vicinity of, but not at, the Bridgeport site constitute property damages under the insurance policies;

3. The "owned property exclusion" does not apply to Chemical Leaman's remedial measures that are designed to correct injury or to prevent further injury to the ground and surface waters in the vicinity of the Bridgeport site.

The court also refused to grant summary judgment in favor of defendants on the issue of coverage for contamination occurring after the date Chemical Leaman received notice from the New Jersey DEP of the extent of the groundwater contamination. *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, 788 F.Supp. 846 (D.N.J.1992).

Presently before the court are the various motions of the parties for summary judgment. On November 23, 1992, the court held oral argument on these motions and reserved its decision. Trial is scheduled to commence on March 15, 1993.

B. *The Insurance Policies*

1. Aetna's Comprehensive General Liability Policies

[1] Chemical Leaman purchased comprehensive general liability insurance ("CGL") from Aetna covering successive years, from April 1, 1959 through April 1, 1985. Pl.'s 12G Statement ¶ 4.[1] These comprehensive liability policies were standard form insurance agreements utilized by Aetna and some other insurance companies throughout the period

[1] LMI moves to strike Chemical Leaman's summary judgment motion on the ground that plaintiff's 12G Statement of Material Facts Not in Dispute is devoid of references to the record. While the court certainly prefers that a 12G Statement contain citations to the record, nothing in Local Rule 12G requires it. LMI's motion is therefore denied.

1960-1985. Chemical Leaman played no role in drafting or negotiating the terms of these policies. Joint Final Pretrial Order ¶ IV.5.

April 1, 1959—April 1, 1961 Aetna Policies

From April 1, 1959 through April 1, 1961, Aetna insured Chemical Leaman under its 1955 standard policy form. Pursuant to the terms of the policies in effect during this period, Aetna agreed to pay on behalf of Chemical Leaman:

> all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

The policy did not define the term "accident." Pl.'s 12G Statement ¶ 5. The policies obligated Aetna to

> defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent.

Pl.'s 12G Statement ¶ 6.

April 1, 1961—April 1, 1967 Aetna Policies

From April 1, 1961 through April 1, 1967, Aetna continued to insure Chemical Leaman under its 1955 standard policy form. However, these policies substituted the word "occurrence" for the word "accident." An "occurrence" was defined as:

> an event which causes injury during the policy period or a continuous or repeated exposure to conditions which results in injury to persons or tangible property during the policy period, if such injury is neither expected nor intended by the insured.

Pl.'s 12G Statement ¶ 7.

April 1, 1967-April 1, 1973 Aetna Policies

From April 1, 1967 through April 1, 1973, Aetna insured Chemical Leaman under its 1966 standard policy form. Pursuant to the terms of these policies, Aetna agreed to pay on behalf of Chemical Leaman:

> all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence.

The policies defined an "occurrence" as:

> an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The policies defined the term "property damage" as "injury to or destruction of tangible property." Pl.'s 12G Statement ¶ 9. Pursuant to the terms of these policies, Aetna also agreed to:

> defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent.

Pl.'s 12G Statement ¶ 10.

April 1, 1973—April 1, 1985 Aetna Policies

From April 1, 1973 through April 1, 1985, Aetna insured Chemical Leaman under its 1973 standard policy form. These policies obligated Aetna to pay:

> all sums which the insured shall become legally obliged to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence.

The policies defined an "occurrence" as:

> an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The term "property damage" was defined in these policies as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Pl.'s 12 Statement ¶ 13. Aetna also agreed to:

> defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent.

Pl.'s 12G Statement ¶ 14.

Pollution Exclusion Clause

From April 1, 1971 through April 1, 1985, Aetna's policies contained a pollution exclusion clause, which stated:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Pl.'s 12G Statement ¶¶ 11, 15.

Notice of Claim Provisions

Each insurance policy issued by Aetna to Chemical Leaman from April 1, 1959 through April 1, 1985, provided that in the event of an accident or occurrence, "written notice ... shall be given by or for the insured to the company or any of its authorized agents as soon as practicable." Pl.'s 12G Statement ¶ 16. The insurance policies also provided that "[i]f claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative." Pl.'s 12G Statement ¶ 17.

Cooperation Provisions

Each insurance policy issued by Aetna to Chemical Leaman from April 1, 1959 through April 1, 1985, provided that the insured shall cooperate with Aetna and generally, among other things, assist in making settlements, in the conduct of suits, in securing and giving evidence and in obtaining the attendance of witnesses. Pl.'s 12G Statement ¶ 18.

2. LMI's Excess and Umbrella Policies[2]

April 1, 1958-April 1, 1985 LMI Excess and Umbrella Policies[3]

Pursuant to the terms of each excess insurance policy issued by LMI to Chemical Leaman for the period April 1, 1958 through April 1, 1985, LMI agreed to provide the same basic coverage as issued by Aetna.[4] The LMI policies also

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[2] For a discussion of how the London insurance market operates, see *Diamond Shamrock Chemicals v. Aetna Casualty & Sur. Co.*, 258 N.J.Super. 167, 189-90, 609 A.2d 440 (App.Div.1992).

[3] At oral argument, Chemical Leaman dismissed any claims it had against LMI on the policy running from April 1, 1985 to April 1, 1986. Tr. of Oral Argument at 27.

[4] Chemical Leaman states in its 12G Statement that LMI's policies essentially "followed form" to Aetna's primary policy. LMI makes a point of disagreeing with this statement, and sets out all the relevant policy terms

(Footnote continued)

included substantially the same notice and duty to cooperate provisions as found in the policies issued by Aetna.

April 1, 1971—April 1, 1985 Pollution Exclusion Clauses

Each LMI insurance policy in effect from April 1, 1971 to April 1, 1985, contain a pollution exclusion clause. The LMI policies in effect from April 1, 1971 to April 1, 1974, and from April 1, 1977 to April 1, 1985, exclude coverage for damage "caused by seepage, pollution or contamination," unless "such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance." LMI 12G Counterstatement ¶ 29. The LMI policies in effect from April 1, 1974 to April 1, 1977, contain a pollution exclusion clause identical to the one contained in the relevant Aetna policies.

C. *Standard for Summary Judgment*

The standard for summary judgment is a stringent one. A court may grant summary judgment only when the materials of record show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Tudor Dev. Group, Inc. v. United States Fidelity & Guar. Co.*, 968 F.2d 357, 359-60 (3d Cir.1992). In deciding whether there is a disputed issue of material fact, the court must resolve doubts in favor of the non-moving party. *Desvi, Inc. v. Continental Ins. Co.*, 968 F.2d 307, 308 (3d Cir.1992). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty*

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of LMI's excess and umbrella policies from 1958 to 1985. However, with the exception of its pollution exclusion clauses, LMI does not argue anywhere in its briefs that this court should interpret the basic coverage and exclusions under the LMI policies differently from those under Aetna's policies. In the absence of such an argument, and upon review of the LMI policy terms, the court finds that coverage under LMI's and Aetna's policies is identical for the purposes of the legal issues addressed in this opinion, unless otherwise noted.

Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

A motion for summary judgment must be granted if the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). If the moving party carries its burden of establishing the absence of a genuine issue of material fact, then the non-moving party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may find that the material facts are not in genuine dispute and adjudicate the matter in accordance with the substantive law. *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11. Finally, if summary judgment is denied, the court may, in the course of deciding the motion, "ascertain what material facts exist without substantial controversy" and deem these facts as established for trial. Fed.R.Civ.P. 56(d).

II. The Expected/Intended Clause

A. *Legal Issues*

1. Burden of Proof

[2] The parties dispute who bears the burden of proof for establishing whether or not the alleged coverable damages caused by Chemical Leaman were "expected or intended." The applicable rules of New Jersey law are clear. The party seeking coverage bears the burden of bringing its claim within the basic terms of the insurance policy. *Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co.*, 98 N.J. 18, 26, 483 A.2d 402 (1984). However, it is the insurer that carries the burden of proving that the loss comes within a policy exclusion. *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 399, 267 A.2d 7 (1970). The defendants read the expected/intended

clause as part and parcel of the basic grant of insurance coverage. Chemical Leaman, on the other hand, argues that the expected/intended clause is an exclusion, thereby placing the burden of proof on the defendants.

[3] The New Jersey Supreme Court described the "basic coverage" provided by policies like the ones in the case at bar as the carrier's obligation to "pay on behalf of the insured all sums which the insured shall become legally obliged to pay as damages because of bodily injury ... to which this insurance applies, caused by an occurrence." *Hartford v. Aetna,* 98 N.J. at 27, 483 A.2d 402. It is, thus, beyond dispute that the insured must prove an occurrence in order to obtain coverage. After 1961, Chemical Leaman's policies with defendants contained clear definitions of an occurrence—namely, "an accident or event which results in property damage neither expected nor intended from the standpoint of the insured." The court finds that this entire definition of occurrence constitutes the grant of basic coverage provided under defendants' insurance policies, and that the insured bears the burden of proving all of the definition's elements, including the expected/intended clause.

Plaintiff would have the court sever this definition of occurrence into two parts. The first part would provide the basic grant of coverage for any accident or event which results in property damage. The second part would operate to exclude a certain category of events resulting in property damage, namely those that are expected or intended by the insured. Dividing the definition into two parts like this, however, is not a reasonable or commonsensical reading. The policies clearly and unambiguously indicate that the full sentence comprises the definition of an occurrence. There is no indication from the language of the definition or from the surrounding context that the policy limits either basic coverage or the definition of occurrence to the first part of the sentence only. Moreover, the court is unable to imagine, and plaintiff has failed to suggest, an alternative phrasing that more clearly and

unambiguously incorporates the concept of unintended and unexpected damages into the definition of occurrence.[5] The court finds that the only reasonable reading of the policy is that the intended/expected concept is constitutive of the definition of occurrence. Therefore, plaintiff bears the burden of proof on this issue.

[4] Chemical Leaman presents several arguments in support of the proposition that the expected/intended clause is an exclusion. It first points out that the insurance carriers originally drafted the expected/intended clause as an exclusion, but then decided to incorporate the clause into the definition of an occurrence. *See* Pl.'s Br. at 12; *see also* Aetna's Br. at 19 & n. 40. However, New Jersey law provides that "an insurance policy should be interpreted according to its plain and ordinary meaning." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 179, 607 A.2d 1255 (1992). The insurance policies' drafting history is, therefore, irrelevant where, as here, the court finds the policy language to be clear and unambiguous. *See Longobardi v. Chubb Ins. Co. of New Jersey*, 121 N.J. 530, 537, 582 A.2d 1257 (1990).

Plaintiff also cites to cases that describe the expected or intended clause as an "exclusion." *See J.T. Baker, Inc. v. Aetna Casualty & Sur. Co.*, 135 F.R.D. 86, 90 (D.N.J.1989); *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 490-92, 388 A.2d 603 (1978) (Pashman, J., concurring); *Lyons v. Hartford Ins. Group*, 125 N.J.Super. 239, 245-47, 310 A.2d 485 (App.Div.1973), *certif. denied*, 64 N.J. 322, 315 A.2d 411 (1974). None of these decisions, however, uses this language in deciding the precise issue now before this court—that is, the burden-of-proof structure under liability policies that

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[5] For example, the policy could have defined an occurrence as "an accident or event which results in unintended and unexpected property damage from the standpoint of the insured." But the meaning of this language is virtually indistinguishable from the actual policy language. Both versions use the expected/intended concept to define the kind of damages that are covered. The difference is one of syntax, not meaning. A reasonable person would find no difference between the two sentences.

provide coverage only for damages neither expected nor intended by the insured. *J.T. Baker* was a discovery case. The specific issue before the court was not which party bears the burden of proof but rather whether the insured's intent should be evaluated from an objective or subjective viewpoint. 135 F.R.D. at 88, 90-92. Similarly, Justice Pashman in his concurrence in *Montes* addressed not the burden of proof issue but rather whether the intent inquiry should focus on the insured's intent to commit a wrongful act or on her intent to cause the resulting damages. 76 N.J. at 490-92, 388 A.2d 603. Finally, in *Lyons*, the court construed an expected/intended clause that did, in fact, appear as an explicit policy exclusion. 125 N.J.Super. at 244, 310 A.2d 485. In sum, plaintiff cites no case applying New Jersey law that characterizes the expected/intended clause as an exclusion for the purpose of determining who bears the burden of proof.

A final concern informs this court's holding that the expected/intended clause is constitutive of the basic grant of coverage under defendants' liability policies. Plaintiff's proposed reading of the expected/intended clause presupposes that a liability policy may cover not only unintended damages caused by intentional acts but *intended* damages as well. However, just as "[o]ne cannot obtain insurance for a risk that the insured knows has already transpired," *Gloucester Township v. Maryland Casualty Co.*, 668 F.Supp. 394, 403 (D.N.J.1987), the New Jersey Supreme Court has stated that public policy favors "[t]he exclusion of intentional injury from coverage" in order to prevent individuals from inflicting damage because they know they will be insured. *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 181, 607 A.2d 1255 (1992) (quoting *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. at 398-99, 267 A.2d 7). Plaintiff's proposed reading of the policy stands in potential conflict with this underlying concern.

2. Objective or Subjective Intent

[5-7] As ruled above, plaintiff, as part of its case for proving that its losses fall within the basic coverage of its insurance policies with defendants, bears the burden of

establishing that Chemical Leaman neither expected nor intended to contaminate the soil and groundwater at the Bridgeport site. The parties, however, disagree on the standard for evaluating Chemical Leaman's intentions. Underlying this dispute is the well established distinction between (1) the intent of the insured in performing the acts that cause damage and (2) the intent of the insured in causing the damage itself. *See Voorhees v. Preferred Mut. Ins. Co.,* 128 N.J. 165, 181-83, 607 A.2d 1255 (1992). Tort law focuses on the first kind of intent. An individual who intentionally performs a particular act will be liable for damage caused by the act, so long as this damage is a foreseeable and probable result. In contrast, insurance law generally focuses on the second kind of intent.[6] An insured who intentionally performs an act that causes damage may be entitled to coverage, so long as the insured did not intend to cause the damage. In other words, a carrier may be held liable for coverage for the unintentional result of an insured's intentional act. *See Lyons v. Hartford Ins. Group,* 125 N.J.Super. 239, 247, 310 A.2d 485 (App.Div.1973), *certif. denied,* 64 N.J. 322, 315 A.2d 411 (1974). In line with

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[6] It is, of course, true that the meaning of "expected and intended" in an insurance policy depends in the first instance on the language of the policy and principles of contract interpretation. There are, however, important reasons for construing the intent required to preclude coverage as the intent to cause damage rather than intent to perform the acts that cause damage. As the court in *J.T. Baker v. Aetna Casualty and Sur. Co.* observed:

> Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent, indeed, in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured from his own lack of due care. If the policy holder were to be told that the words of the "occurrence" definition excluding coverage for "expected or intended" damages actually mean that coverage is also lost for damage which a prudent person "should have" foreseen, there would be no point to purchasing a policy of liability insurance.

135 F.R.D. 86, 92 (D.N.J.1989).

these principles, the intent inquiry in the present case focuses not on Chemical Leaman's intent to place contaminated water in ponds and lagoons at the Bridgeport site, but rather on Chemical Leaman's intent to cause the resulting soil and groundwater damage which it is now obligated to remediate.

The parties dispute whether the inquiry into Chemical Leaman's intent is a subjective or objective one. The New Jersey Supreme Court has recently and clearly addressed this issue. The general rule requires an evaluation of "the insured's subjective intent to determine intent to injure." *Voorhees,* 128 N.J. at 185, 607 A.2d 1255. However, where "exceptional circumstances" are present that "objectively establish the insured's intent to injure," the trier of fact may presume the insured's intent "from the act without an inquiry into the actor's subjective intent." *Id.* at 184, 607 A.2d 1255. These exceptional cases arise when the insured's "actions are particularly reprehensible." *Id.* at 185, 607 A.2d 1255.

[8] Defendants ask this court to invoke the *Voorhees* particularly-reprehensible-act exception and to mandate an objective inquiry. Under this standard, the trier of fact may presume from an insured's intentional acts which cause damage that the insured intended to cause the particular resulting damage. The Supreme Court in *Voorhees* identified the case of sexual abuse of children in a day-care center as a paradigm example of presuming the insured's subjective intent to cause a particular kind of damage from the insured's intent to perform the acts that cause that damage. 128 N.J. at 184-85, 607 A.2d 1255 (citing *Atlantic Employers v. Tots & Toddlers Pre-School Day Care Center,* 239 N.J.Super. 276, 571 A.2d 300 (App.Div.), *certif. denied,* 122 N.J. 147, 584 A.2d 218 (1990)). As the court observed, "sexual assault of children is so inherently injurious that it can never be an accident." *Id.* 128 N.J. at 185, 607 A.2d 1255.

[9] Thus, this court must address whether Chemical Leaman's acts at the Bridgeport site were so reprehensible as to require a presumption that Chemical Leaman expected or intended to cause the groundwater and soil damage. Defendants

claim that Chemical Leaman's "design and implementation of an unlined lagooning system at the Bridgeport Terminal" represent an example of particularly reprehensible and egregious behavior. LMI's Reply Br. at 8; *see also* Aetna's Br. at 15. But the crux of their argument is that "Chemical Leaman *knew* that their unlined lagoons would cause groundwater contamination." LMI's Reply Br. at 14 (emphasis added). While the facts underlying this proposition may succeed in excluding coverage by proving that Chemical Leaman expected or intended to cause groundwater and soil damage, they fail in the present context to establish that Chemical Leaman's behavior was particularly reprehensible.

The central issue in this litigation is whether Chemical Leaman knew that its Bridgeport rinsewater treatment system was so inadequate that its use would result in harm to the environment. The record, however, contains abundant evidence that Chemical Leaman designed and built the facility to prevent this result. E.g. McLane Report at 2-3, Pl.'s App.Ex. 17; Elston Dep. at 132, 137, 214; Ford Dep. at 192; Middleton Dep. at 85. In addition, there is testimony that other companies with similar wastewater treatment problems used unlined ponds and lagoons. *See* Middleton Dep. at 105-06; Ford Dep. at 315. The rinsewater treatment system was more than a "series of holes in the ground." Rather, it represented Chemical Leaman's attempt, however flawed, at waste disposal.

This fact distinguishes the present case from *Morton International v. General Accident Ins. Co. of Am.*, No. A-895-89T3, 1991 WL 348049 (N.J.Super.App.Div. Oct. 2, 1991). There the Appellate Division granted summary judgment to the defendant insurance companies based on the objective approach. The insured in *Morton International* allowed mercury-laden effluent to flow, untreated, into a nearby creek from 1961 to 1970. From 1970 to 1974, the insured's use of a waste treatment system abated but did not completely halt the flow of mercury into the creek. *Id.* at **3-4. Based on these facts, the Appellate Division applied the objective approach and granted summary judgment to the defendant insurance companies, finding that the insured's behavior of "[t]hrowing

toxic waste out into the meadowlands," *id.* at *16, to be so inherently injurious as to be indistinguishable from the child abuse paradigm. *Id.*

Unlike in *Morton International,* the proof in the present case tends only to establish that Chemical Leaman knew that, despite its treatment system, the toxins in the rinsewater were causing damage to the groundwater.[7] This evidence goes to the central factual issue of whether the expected/intended clause precludes coverage. But it does not rise to so reprehensible a level as to trigger the *Voorhees* exception. The court, therefore, holds that the *Voorhees* particularly-reprehensible-act exception is inapplicable to the present case. *Hatco Corp. v. W.R. Grace & Co.,* 801 F.Supp. 1334, 1375-76 (D.N.J.1992). Plaintiff's burden of proof is to show that Chemical Leaman neither subjectively intended to cause nor was substantially certain it was causing soil and groundwater damage. *Ambassador Ins. Co. v. Montes,* 147 N.J.Super. 286, 292, 371 A.2d 292 (App.Div.1977), *aff'd on other grounds,* 76 N.J. 477, 388 A.2d 603 (1978).

B. *Aetna's Motion for Summary Judgment on Its Pre-1961 "Accident"-Based Policies*

Aetna asks for summary judgment in its favor on the issue of coverage under its pre-1961 policies. These policies provided coverage for damage resulting from an "accident" rather than from an "occurrence," as in Aetna's post-1961 policies. Aetna makes two arguments. It first contends that these accident-based policies covered only an event, not a

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[7] The court notes that there is evidence in the record that material from the Bridgeport facility discharged directly into a nearby swamp. *See* LMI's 12 Statement ¶¶ 57, 77, 87. Further evidence suggests that drums containing solid waste leaked directly onto the ground. *See id.* ¶ 91. The court finds that this evidence does not suffice to show that it was Chemical Leaman's *intention* for contaminated material to end up in the nearby swamp. However, this evidence, if believed by a jury to establish that Chemical Leaman knew or expected that its waste water would flow into the swamp, may support a finding of no coverage.

process. Since, according to Aetna, there can be no dispute that the groundwater and soil contamination at issue were caused by a long-term process rather than a single, bounded event, summary judgment is appropriate.

The pre-1961 policies did not define the word "accident." Accordingly, the court's task is to construe this term. The only New Jersey Appellate Division opinion that has apparently touched upon this issue in the context of environmental pollution is *Diamond Shamrock Chem. v. Aetna Casualty & Sur. Co.*, 258 N.J.Super. 167, 609 A.2d 440 (App.Div.1992). In that case, the trial judge excluded soil and water contamination from coverage under an accident-based policy, ruling that the term "accident" means "a discrete fortuitous event which happens within a short time at a specific time and place." *Id.* at 199, 609 A.2d 440. The Appellate Division, deciding the case on other grounds, did not review the propriety of this ruling. *Id.* The court did, however, point to conflicting lines of authority in New Jersey case law on whether the term accident contains a temporal aspect. *Id.* at 199-200, 609 A.2d 440.

[10] New Jersey law provides that the terms of an insurance contract should be understood according to their popular and common meaning. *See Kindervater v. Motorists Casualty Ins. Co.*, 120 N.J.L. 373, 376, 199 A. 606 (1938). However, "[w]hen the meaning of a phrase is ambiguous, the ambiguity is resolved in favor of the insured ... and in line with an insured's objectively-reasonable expectations." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992) (citation omitted); *cf. infra* Part IV.C. The court finds that the term accident is ambiguous when viewed in the context of liability for long-term environmental contamination. The 1957 *Black's Law Dictionary* defined the term accident as follows:

> In its most commonly accepted meaning, or in its ordinary or popular sense, the word may be defined as meaning a fortuitous circumstance, event, or happening, an event happening without any human

> agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens....

Black's Law Dictionary 30 (4th ed. 1957), quoted in *Moffat v. Metropolitan Casualty Ins. Co. of New York*, 238 F.Supp. 165, 170 (M.D.Pa.1964). Absent from this definition is any limitation of an accident to a short-term event. Relying on this definition, courts have applied accident-based policies to polluting processes that occur over a long period of time. *See Moffat*, 238 F.Supp. 165 (liability resulting from long-term burning of coal mining wastes covered under accident-based policy). Because the common understanding of the term "accident" does not necessarily exclude long-term happenings, this court views the term as ambiguous and gives it a meaning that will result in coverage in the present case. Accordingly, the court construes the word "accident" in the pre-1961 policies to cover the long-term soil and groundwater contamination process at issue in the present case.

Having ruled that an accident-based policy can cover environmental damage to soil and groundwater over the course of many years, the court must now determine the appropriate intent standard. The New Jersey courts have spoken more clearly on this matter, defining the word "accident," as an

> " 'unexpected happening without intention or design.'.... Under this test, a volitional act by the insured nevertheless qualified as an "accident" if the insured did not specifically intend to cause the resulting harm or [was] not substantially certain that such harm w[ould] occur."

Broadwell Realty Serv. Inc. v. Fidelity & Casualty Co., 218 N.J.Super. 516, 532, 528 A.2d 76 (App.Div.1987) (citations omitted); *see also Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, No. A-895-89T3, 1991 WL 348049 **19-21 (N.J.Super.App.Div. Oct. 2, 1991). *Diamond Shamrock*, 258 N.J.Super. at 200, 609 A.2d 440; *SL Indus. v. Am. Motorists Ins. Co.*, 248 N.J.Super. 458, 465, 591 A.2d 677

(App.Div.1991), *aff'd as modified and remanded,* 128 N.J. 188, 607 A.2d 1266 (1992). In other words, New Jersey law defines the term "accident" in the accident-based policies in substantially the same manner as the definition of an "occurrence" in the occurrence-based policies—an event neither expected nor intended by the insured.

In light of the above analysis, plaintiff at trial will bear the same standard of proof on the pre-1961 accident-based policies as it will on the occurrence-based policies. However, unlike with the post-1961 policies, Aetna challenges whether any soil or groundwater damage occurred to trigger the pre-1961 policies. The parties stipulated that Chemical Leaman provided tank truck cleaning services "since sometime in 1960." Joint Final Pretrial Order ¶ IV.30. Indeed, by March 1961, the record is clear that Chemical Leaman was using "basins" to collect wastewaters after it cleaned the tank trucks. *See* Letter from William T. Frank, Aetna's Ex. 8. Plaintiff's expert hydrogeologist states that

> Contaminated rinsewater from the three settling ponds started migrating through the soil to underlying ground water almost immediately after the beginning of pond operation in 1960. Contaminated rinsewater from the three settling ponds started migrating through the soil to underlying ground water almost immediately following the beginning of lagoon operation in 1962.

McLane Report at 12, Pl.'s App.Ex. 18. Aetna does not challenge this conclusion. In light of this undisputed fact, the court finds that groundwater and soil damage occurred sometime in 1960. Accordingly, the court holds that property damage triggered Aetna's April 1, 1960 through April 1, 1961, policy. Chemical Leaman, however, has presented no evidence of damage that could have triggered the April 1, 1959 through April 1, 1960, policy. Accordingly, the court grants summary judgment in Aetna's favor on this policy. Chemical Leaman may not recover under Aetna's 1959-1960 policies.

C. *The Parties' Cross-Motions for Summary Judgment on the Expected/Intended Issue*

The parties have submitted cross-motions for summary judgment on all policies on the issue of whether Chemical Leaman expected or intended to cause soil and groundwater damage. As ruled above, Chemical Leaman bears the burden of proof of showing that it neither expected nor intended to cause the disputed damages for each of defendants' policies. In resolving this fact issue, the jury must evaluate Chemical Leaman's subjective intent to cause the particular damage for which plaintiff now seeks indemnification—namely soil and groundwater damage.

1. Chemical Leaman's Evidence

Plaintiff presents evidence that Chemical Leaman's rinsewater treatment system was designed to prevent harm to the environment by facilitating the elimination of toxic chemicals through natural processes. The rinsewater from Chemical Leaman's tank cleaning operations flowed into a series of unlined ponds and lagoons. Chemical Leaman designed this system to enhance the cleansing and removal of chemical constituents from the rinsewater through natural processes, such as phased gravity separation, sedimentation, floatation, microbial biodegradation, aeration, percolation, and evaporation. For example, the design concept limited the depth of the ponds to five feet in order to allow sunlight penetration and enhanced bacteriological degradation. In addition, the system contemplated that rinsewater would percolate down through the soil, and that adsorption, absorption, and attenuation by the soil, as well as microbial biodegradation, would remove chemical contaminants. The system further relied on gravity to separate materials by allowing the heavier materials to settle to the bottom of the pond or lagoon and the lighter materials to float to the top. Chemical Leaman then periodically removed settled particles or floating materials through dredging and skimming. Each pond or lagoon was connected to the next by a "tee" pipe, which, according to plaintiff, permitted only the cleanest rinsewater to pass to the next pond

or lagoon. The fourth and fifth lagoons contained aeration devices to increase the oxygen level in the lagoon, thereby enhancing microbial biodegradation. An overflow pipe in the last lagoon operated as a safety valve to prevent a rupture in the lagoon dike.

Plaintiff has submitted evidence that the individuals who designed and oversaw the rinsewater treatment system did not expect or intend to cause soil or groundwater damage. *E.g.* Elston Aff. ¶¶ 3, 4 (attached as Ex. 3 to Pl.'s App. of Exs.).[8] The record also contains testimony from individuals familiar with the Bridgeport site, as well as from the insurers' expert, that the rinsewater treatment system could and did perform some or all of the purifying functions for which it was designed. Ford Dep. at 203-05; Lakhani Dep. at 77-78; Swanson Dep., Vol. II, at 48-50, 56-58. Moreover, the use of unlined lagoons and ponds may have been standard practice in the truck cleaning business as well as in some other industries utilizing wastewater disposal methods. E.g. Middleton Dep. at 105-06; Ford Dep. at 315; Robinson Dep. at 72-73.

2. Defendants' Evidence

Defendants' evidence comprises three main categories. First, defendants introduce "state-of-the-art" scientific evidence to show that Chemical Leaman must have known that the Bridgeport rinsewater treatment system would contaminate the soil and groundwater. Second, defendants proffer evidence of investigations into environmental pollution occurring at the Bridgeport site. Third, defendants present evidence of Chemical Leaman's knowledge of soil and groundwater contamination at Chemical Leaman truck cleaning sites other than the Bridgeport facility.

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[8] LMI challenges the Elston Affidavit as untimely for use in support of Chemical Leaman's motion for summary judgment. LMI's Reply Br. at 8-9. The court does not address LMI's challenge because it does not grant Chemical Leaman summary judgment on the expected and intended issue.

State-of-the-Art Scientific Evidence

[11] According to defendants, it was well known at the time the Bridgeport facility opened that unlined lagoons had a propensity to pollute soil and groundwater. For example, one scientific text, published in 1955, states:

> Absorption lagoons are specifically designed to permit seepage of liquid into the ground. This seepage ultimately reaches a stream or an underground water stratum; hence absorption lagoons should not be employed for toxic wastes.

Gurnham, Principles of Industrial Waste Treatment 319 (1955). Similarly, defendants present evidence of rinsewater treatment techniques used to clean railroad tank cars. Thus, the General American Transportation Corporation apparently employed a "large, impermeable solar evaporation basin ... coated with an asphaltic concrete mix" to treat rinsewater. LMI Reply Br. at 12. Defendants assert that the designers of Chemical Leaman's Bridgeport system, as professional sanitary engineers who kept up with current development, necessarily must have been aware of this scientific information, and therefore must have known that the contaminants would pollute the soil and groundwater.[9]

Bridgeport Site Evidence

Defendants submit evidence that Chemical Leaman was aware that its Bridgeport system was causing environmental problems. The record contains reports of individuals and monitoring entities that, at various times, expressed concern

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[9] According to defendants, the principal engineer in charge of designing the rinsewater treatment system was Edwin Wagner. Because Mr. Wagner is dead, it is difficult to establish the breadth of his knowledge at the time the Bridgeport facility was built. There is, however, testimony from other individuals on Mr. Wagner's actions and knowledge. *See* Elston Dep.; Holman Dep. And it is permissible for a jury, if it so chooses, to infer from Mr. Wagner's professional standing as a sanitary engineer that he had actual knowledge of state-of-the-art scientific knowledge.

that waste material was flowing directly into a nearby swamp and creek. LMI's 12G Statement ¶¶ 9, 28, 57, 77, 81, 87. A 1966 petition signed by residents living near the Bridgeport facility complained "that matters and things emanating from the property of Chemical Leaman Tank Line, Inc., have permeated food stuff and growing things." Aetna's Ex. 21. In a 1970 report, the New Jersey DEP stated that Chemical Leaman "is still discharging objectionable materials into the waters of the State." Aetna's Ex. 27. Also in 1970, a senior public health engineer in New Jersey found that the high phenols concentration in the wastewater "may produce toxic conditions in the swamp and stream." Aetna's Ex. 34. The record further contains evidence showing that Chemical Leaman was regularly informed that its facility was causing air pollution. *See* Aetna's Exs. 8, 44, 69.

Other Chemical Leaman Sites

Finally, defendants present evidence that Chemical Leaman's problems at other tank cleaning sites gave the company actual knowledge that the use of unlined ponds and lagoons would contaminate the soil and the groundwater. For example, in 1960, West Virginia environmental authorities informed Chemical Leaman that the use of storage ponds in Putnam county had resulted in groundwater pollution. LMI's 12G Statement ¶ 5. Then in 1969, West Virginia ordered Chemical Leaman to stop the use of these lagoons because contaminated waters were leaching and seeping into the groundwater. LMI 12G Statement ¶ 26. In 1966, a consultant commissioned to investigate a Chemical Leaman site in Pennsylvania stated that "[w]ithout a groundwater and substrata study, we cannot be sure that some wastewater infiltration does not occur." LMI's 12G Statement ¶ 22. Another consultant warned that "no microbial degradation" was occurring in the lagoons at Chemical Leaman's West Caln Township site. The consultant recommended that Chemical Leaman "take steps to insure that so long as dumping is continued into these pits no highly toxic materials will be added to them." LMI's 12G Statement ¶ 20.

3. Conclusions

[12] The court first finds that defendants have presented abundant evidence tending to establish Chemical Leaman's knowledge of the deleterious effect of its Bridgeport rinsewater treatment system on the soil and groundwater. A reasonable juror may fairly conclude from this material that plaintiff has failed to prove by a preponderance of the evidence that Chemical Leaman neither expected nor intended its system of ponds and lagoons to cause this damage. Accordingly, Chemical Leaman's motion for summary judgment on the expected/intended requirement is denied.

The more difficult question is whether the present record requires the court to find that there can be no genuine dispute that Chemical Leaman did intend to pollute the soil and groundwater. The court looks to two recent cases for assistance. In *Diamond Shamrock Chemical v. Aetna Casualty & Surety Co.*, 258 N.J.Super. 167, 609 A.2d 440 (App.Div.1992), the Appellate Division upheld the Chancery Division's finding, after a full bench trial on the merits, that the insured, Diamond, expected and intended to pollute the environment at its Agent Orange manufacturing facility in Newark, New Jersey. The evidence at trial established that Diamond's management knew of the hazardous nature of the chemicals it was producing. *Id.* at 182-83, 609 A.2d 440. Despite this knowledge, Diamond failed to take steps to prevent the emission of these chemicals into the environment. The company regularly vented contaminants directly into the atmosphere. *Id.* at 214, 609 A.2d 440. The plant commonly experienced leaks and spills in the manufacturing area, and when employees cleaned the floor, some of the run-off flowed directly into a nearby river. *Id.* Pipes carrying contaminants leaked. *Id.* at 184-85, 609 A.2d 440. When the company washed down railroad cars that hauled Agent Orange, the effluent seeped onto the tracks and into the ground. *Id.* at 185, 609 A.2d 440. After reviewing this evidence, the Appellate Division affirmed the lower court's determination "that Diamond knew 'the nature of the chemicals it was handling,' knew that 'they were being continuously discharged into the

environment,' and knew that 'they were doing at least some harm.' " *Id.* at 211, 609 A.2d 440.

The court in *Hatco Corp. v. W.R. Grace & Co.*, 801 F.Supp. 1334 (D.N.J.1992), addressed summary judgment motions on the expected or intended requirement in a case similar to the one at bar. There, the insured brought suit against its primary and excess insurance carriers for coverage on its cleanup liability pursuant to CERCLA. The insured operated an industrial chemical manufacturing facility in Ford, New Jersey, between 1959 and 1978. Early in the plant's history, effluent containing hazardous byproduct chemicals was pumped directly into streams and ditches that led directly into the Passaic River. In the early to mid 1960s, the insured built unlined ponds to hold the effluent so that chemical products could be recovered, reprocessed, and then sold. Later, the insured installed clay-lined lagoons and a sewer line that connected to a regional authority's industrial sewer system. *Id.* at 1343.

The court in *Hatco* found that the carriers had presented evidence establishing that the insured knew in the 1960s that its waste disposal practices caused extensive surface water and air pollution. *Id.* at 1376. The carriers also submitted evidence tending to show the insured's knowledge in the mid 1960s of the possibility that effluent pumped into unlined holding ponds could seep into the ground. *Id.* at 1376. The court, however, refused to presume, as a matter of law, that this evidence amounted to undisputed proof that the insured expected or intended to cause soil and groundwater damage. Accordingly, the carriers' motions for summary judgment were denied. *Id.*

The court reads *Diamond Shamrock* and *Hatco* to establish the following standards for granting summary judgment in defendants' favor in the present case. The record must reflect no genuine disputes as to three factual propositions. First, Chemical Leaman must have known of the environmental hazards of the contaminants it was putting into its ponds and lagoons. Second, Chemical Leaman must have known that the

contaminants in the ponds and lagoons were seeping into the soil and groundwater. Third, Chemical Leaman must have known that the contaminants that were seeping into the soil and groundwater were causing permanent damage to the soil and groundwater. If these factual predicates are established on the present record, then the court may rule as a matter of law that Chemical Leaman expected or intended to cause soil and groundwater contamination.

Knowledge of the Environmental Hazards of the Contaminants

The entire thrust of plaintiff's evidence on the expected/intended issue is that Chemical Leaman designed its unlined ponds and lagoons treatment system to remove contaminants from the rinsewater. In light of this argument, plaintiff cannot reasonably contest the fact that it was aware of the environmental hazards of the contaminants it placed into the rinsewater treatment system. The court, therefore, deems this fact as established. See Fed.R.Civ.P. 56(d).

Knowledge That the Contaminants Were Seeping Into the Soil and Groundwater

Analysis of this factual issue must distinguish between soil and groundwater. There can be no dispute that Chemical Leaman knew that the contaminants were seeping into the soil. Chemical Leaman left the ponds and lagoons unlined precisely because one of the goals of the rinsewater treatment system was to utilize the soil in the cleansing process. Accordingly, the court deems this to be an established fact. *See* Fed.R.Civ.P. 56(d).

In contrast, the court finds that the state of Chemical Leaman's knowledge with respect to the seepage of contaminants into the groundwater remains in dispute. Evidence in the record indicates that Chemical Leaman was at various times informed that contaminants from the rinsewater treatment system could reach or were reaching the groundwater. However, Chemical Leaman is entitled to challenge the relevance, materiality, credibility, and weight that should be given to this

material. For example, plaintiff argues, and a jury may reasonably find, that Chemical Leaman understood groundwater contamination at facilities other than the Bridgeport terminal to be site specific. *Cf. New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1191-92 (3d Cir.1991). Accordingly, Chemical Leaman's knowledge of the seepage of contaminants into the groundwater remains a genuine issue of fact that must be resolved at trial.

Knowledge That the Contaminants Were Causing Permanent Damage

The court finds that a genuine dispute exists on whether Chemical Leaman intended that the rinsewater treatment system at its Bridgeport facility result in the contamination of the soil. It is true that Chemical Leaman's rinsewater treatment system resulted in known contaminants settling in the soil at the bottom of the ponds and lagoons. It is also true that this fact, when combined with the fact established above that Chemical Leaman knew of the deleterious effect on the environment of the contaminants in the rinsewater, would normally lead to the conclusion that Chemical Leaman knew that permanent damage to the soil would result. However, there is evidence that Chemical Leaman may have believed it rid the soil of these contaminants when it periodically dredged the bottom of the ponds and lagoons. Moreover, there is testimony that the designers and operators of the unlined rinsewater treatment system believed that the processes of filtration, biodegradation, and adsorption would remove and breakdown the contaminants, much like a domestic septic system was thought to operate. *See* Elston Dep. at 137-38; Ford Dep. at 386-87. A jury may reasonably infer from this evidence that Chemical Leaman neither expected nor intended to contaminate the soil, even though it placed known pollutants into the soil.

The court also finds that Chemical Leaman's knowledge that the seeping contaminants would cause permanent damage to the groundwater is necessarily a disputed issue given that it remains an open factual issue for resolution at trial.

Based on the foregoing analyses, the court denies the defendants' motions for summary judgment on the expected/intended issue.

III. Continuous Trigger Theory

The parties are in agreement that between 1960 and 1975, Chemical Leaman daily placed between 10,000 and 20,000 gallons of contaminated rinsewater into the unlined ponds and lagoons at the Bridgeport site. *See* Aetna's Br. at 16; Pl.'s Reply Br. at 59; LMI Br. at 4. It therefore appears undisputed that an event resulting in property damage occurred during these years to trigger the policies then in effect. Chemical Leaman, however, is also suing for coverage under defendants' policies in effect between 1975 and 1985, after the company stopped using the unlined ponds and lagoons treatment system. In order to obtain coverage under these policies, Chemical Leaman argues that New Jersey applies a "continuous trigger" theory to determine the time when property damage occurred within the meaning of defendants' insurance policies. According to Chemical Leaman, the continuous trigger theory provides that all of defendants' policies are triggered from 1960 (when Chemical Leaman first began operating the Bridgeport rinsewater treatment system) through 1985 (when Chemical Leaman claims it became fully aware of both the nature and extent of the groundwater contamination and its legal obligation to pay damages resulting from that contamination). The continuous trigger theory would allow Chemical Leaman to recover the full amount under any policy falling within the trigger period. *See Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C.Cir.1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982). Defendants contest the proposition that New Jersey courts would apply the continuous trigger doctrine to the present case.

[13] This court finds that New Jersey law permits the application of the continuous trigger theory, subject to certain predicate factual findings. *Accord Hatco Corp. v. W.R. Grace & Co.*, 801 F.Supp. 1334, 1344-46 (D.N.J.1992). Indeed, the

New Jersey Appellate Division has already adopted the continuous trigger approach. In *Gottlieb v. Newark Ins. Co.*, 238 N.J.Super. 531, 570 A.2d 443 (App.Div.1990), the court addressed the question of when liability would be triggered for the migration of pesticide from the area in a house where it was originally applied. The trial court granted summary judgment, ruling that the policy unambiguously defined "occurrence" to include only those damages that occurred upon initial exposure and discovery of contamination in the house in 1982. *Id.* at 532-33, 570 A.2d 443. The Appellate Division reversed and held that the carrier's 1983, 1984, and 1985 policies also provided coverage for the subsequent migration of the pesticide. Finding that the term "occurrence" was ambiguous when applied to the phenomenon of continuing damage, the court in *Gottlieb* adopted a continuous trigger analysis in order to interpret and define the term. *Id.* at 535-36, 570 A.2d 443. "[W]here an injury process is not a definite discrete event, the date of occurrence should be the continuous period from exposure to manifestation of damage." *Id.* at 535, 570 A.2d 443.

Under the continuous trigger theory, all insurance policies activated by an ongoing occurrence "are jointly and severally liable to policy limits for all damages resulting from that occurrence, including damage that occurred before and after the policy period." *Hatco Corp.*, 801 F.Supp. at 1346. The court in *Hatco* articulated the reasoning for adopting joint and several liability. "First, the language of the policies themselves do not limit coverage to injury that occurs during the policy period. Thus, as a matter of contract interpretation, overlapping coverage, in effect, had been bargained for." *Id.* (citation omitted). Second, the court analyzed language similar to that found in Aetna's and LMI's policies and determined that "because the Insurers agreed to 'pay all sums which the insured shall become legally obligated to pay as damages', they in effect step into the shoes of the insured." *Id.* In the present case, Chemical Leaman's "shoes" entail strict liability under CERCLA for the full cost of the cleanup of soil and groundwater damages caused by the Bridgeport facility, regardless of when it disposed of the hazardous substances. This court finds

the analysis in *Hatco* persuasive and holds that all policies triggered by a continuous occurrence will be jointly and severally liable. *See also Lac D'Amiante Du Quebec v. Am. Home Assurance,* 613 F.Supp. 1549, 1561-63 (D.N.J.1985).

[14] New Jersey law requires the insured to make two factual showings before imposing joint and several liability under the continuous trigger theory.[10] First, the insured must establish that some kind of property damage occurred during each policy period for which the insured seeks coverage. G440 (App.Div.1992). *Gottlieb,* 238 N.J.Super. at 536, 570 A.2d 443; *Hatco Corp.,* 801 F.Supp. at 1354. Thus, in the present case, Chemical Leaman must prove that soil and groundwater damage took place during the period of each policy for which it seeks coverage. Second, the insured must establish that the property damage was part of a continuous and indivisible process of injury. *Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co.,* 98 N.J. 18, 29, 483 A.2d 402 (1984); *Hatco Corp.,* 801 F.Supp. at 1345. Here Chemical Leaman needs to show that the injuries caused by its use of the Bridgeport rinsewater treatment system were of a continuous, indivisible bature. The court finds that, despite evidence submitted by Chemical Leaman, *see* Pl.'s Reply Br. at 56, 59, neither of these issues is undisputed on the basis of the present record. Plaintiff's motion for summary judgment on the continuous trigger theory must be denied.

[15] In sum, if Chemical Leaman establishes these factual predicates it may recover from defendants the full amount of coverage *permitted under each insurance policy* in effect from 1960 until *the manifestation of the soil and groundwater damage.* The court underscores the two phrases in the previous sentence in order to emphasize additional issues that are potentially in dispute. First, defendants may defeat plaintiff's

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[10] The insured must establish that a policy is triggered in order to obtain coverage, and therefore must bear the burden of proof. *Diamond Shamrock Chemicals v. Aetna Casualty & Sur. Co.,* 258 N.J.Super. 167, 218, 609 A.2d 440 (App. Div.1992).

recovery under a policy activated by a continuous trigger if defendants establish that an applicable policy exclusion bars coverage. *Hatco Corp.*, 801 F.Supp. at 1344.[11] If an exclusion applies, coverage is precluded notwithstanding the continuous trigger. A second issue concerns the timing of the manifestation of the soil and groundwater damage. Chemical Leaman maintains that it only became aware in 1985 of the full scope of the property damage caused by the soil and groundwater contamination and its ensuing liabilities for cleanup costs. Defendants argue for an earlier date. The undeveloped state of the record requires the court to find that this issue remains a disputed fact question. It is for the jury to decide the date of manifestation.

IV. Pollution Exclusion Clause

A. *The Broadwell Line of Cases*

Defendants' policies in effect after April 1, 1971 contain pollution exclusion clauses. The parties dispute whether the events causing the soil and groundwater damage fall within the "sudden and accidental" exception to the pollution exclusion provision.[12] This heavily litigated issue turns in the first

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[11] The court notes that the "Other Insurance" clauses found in certain of defendants' policies only affect the rights of the insurers among themselves. They do not implicate Chemical Leaman's right to full recovery under each triggered policy. *Starks v. Hosp. Serv. Plan of N.J., Inc.*, 182 N.J.Super. 342, 351, 440 A.2d 1353 (App.Div.1981), *aff'd*, 91 N.J. 433, 453 A.2d 159 (1982); *Cozzi v. Government Employees Ins. Co.*, 154 N.J.Super. 519, 529, 381 A.2d 1235 (App.Div.1977); *see also Lac D'Amiante Du Quebec*, 613 F.Supp. at 1563.

[12] LMI's pollution exclusion clause for its policies in effect from April 1, 1971, to April 1, 1974, and for April 1, 1977, to April 1, 1985, contain an exception for a "sudden, unintended, and unexpected happening." The court's analysis on whether the term "sudden" contains a temporal element is controlling for these policies. And, because the court finds that "accidental" means unintended and unexpected, there is no reason to construe "sudden, unintended, and unexpected" any differently than "sudden and accidental." Indeed, neither LMI nor Chemical Leaman makes any argument to the contrary.

instance on the meaning of the word "sudden." Defendants argue that Chemical Leaman's placing of pollutants in the ponds and lagoons was not sudden because, temporally, it took place over many years rather than all at once. Plaintiff rejects this proposed definition and asks the court to rely on a line of New Jersey appellate precedent which, beginning with the case of *Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co.*, has defined the word "sudden" without a temporal element, construing the "sudden and accidental" exception to apply to "an 'unexpected,' 'unforeseen' or 'fortuitous' event." 218 N.J.Super. 516, 536-37, 528 A.2d 76 (1987); *see also Summit Assoc., Inc. v. Liberty Mut. Fire Ins. Co.*, 229 N.J.Super. 56, 62, 550 A.2d 1235 (App.Div.1988). Thus, under Chemical Leaman's proposed reading, the "sudden and accidental" exception does not contain a temporal element, and it is therefore irrelevant that the discharge and spread of toxic material took place over the course of more than two decades.

The court's task is to interpret the meaning of the pollution exclusion clause under New Jersey law. Although there exists a line of Appellate Division cases, the state Supreme Court has not yet directly ruled on the issue.[13] "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. A.T. & T.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940). Thus, "[t]he decisions of lower appellate courts may be persuasive, should be accorded proper regard and are presumptive evidence of state law." *Commercial Union Ins. v. Bituminous Casualty Corp.*, 851 F.2d 98, 100 (3d Cir.1988).

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[13] The court notes that the New Jersey Supreme Court has granted certification on the pollution exclusion clause issue in *Morton Int'l, Inc. v. General Acc. Ins. Co. of Am.*, 127 N.J. 563, 606 A.2d 374 (1992).

Defendants propose two alternative arguments as to why this court should rule that *Broadwell* and its progeny are wrongly decided. First, they contend that the term "sudden" is clear and unambiguous in its meaning, and includes a temporal element. Second, defendants maintain that, even assuming that the term "sudden" is ambiguous, extrinsic evidence proves that the drafters of the pollution exclusion clause intended for the term to include a temporal dimension. The court addresses each of these arguments in turn.

B. *The Ambiguous Meaning of the "Sudden and Accidental" Exception*

[16] In *Broadwell,* the Appellate Division, after noting the "extraordinary number of lawsuits" generated by the pollution exclusion, found that the "sudden and accidental" clause was ambiguous because the meaning of the term "sudden" may or may not included a temporal element. 218 N.J.Super. 516, 536, 528 A.2d 76 (App.Div.1987). Recent caselaw has affirmed this result. *CPC Int'l v. Northbrook Excess & Surplus Ins.,* 962 F.2d 77 (1st Cir.1992) (applying New Jersey law); *Hatco Corp. v. W.R. Grace & Co.,* 801 F.Supp. 1334, 1349-50 (D.N.J.1992); *see also New Castle County v. Hartford Acc. and Indem. Co.,* 933 F.2d 1162, 1198-99 (3d Cir.1991) (finding "sudden and accidental" phrase ambiguous under Delaware law). The court follows the reasoning and analyses in these cases, and predicts that the New Jersey Supreme Court will do the same.

C. *Contra Proferentum vs. "Sophisticated Insured"*

Defendants' second argument acknowledges that the word "sudden" is ambiguous under New Jersey case law, but relies on extrinsic evidence to prove that the term contains a temporal aspect. The principle implicitly at work in this argument is the standard contract rule that extrinsic evidence is admissible to explain an ambiguous contract.

[17, 18] The court must reject defendants' invitation to evaluate the proffered evidence of drafters' intent. Even assuming that the evidence of the drafter's intent conclusively

shows the desired meaning of the word "sudden," the doctrine of *contra proferentum*—or "against the one who proffers"—precludes this court from considering this evidence. In insurance law, the doctrine of *contra proferentum* provides that where a term in an insurance policy is ambiguous, giving rise to two equally plausible interpretations, the term will be given the meaning that results in coverage. *Mazzilli v. Accident & Casualty Ins. Co. of Winterthur*, 35 N.J. 1, 7-8, 170 A.2d 800 (1961). The reason for this rule of interpretation is that New Jersey law considers standard form insurance policies to be contracts of adhesion. *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 335, 495 A.2d 406 (1985). The insurance carriers generally draft the language of these policies on their own, without input from or negotiation with the insured. *See New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1181, 1182 n. 43 (3d Cir.1991). These circumstances require that "[w]hen the meaning of a phrase is ambiguous, the ambiguity is resolved in favor of the insured ... and in line with an insured's objectively-reasonable expectations." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992) (citation omitted).

[19, 20] Defendants argue that the strict rule of *contra proferentum* should not be followed in the present case, because Chemical Leaman is a "sophisticated" buyer and user of insurance. This court, however, is convinced that the size or sophistication of the insured is irrelevant under New Jersey law to the application of the rule of *contra proferentum* when the policy in dispute has been drafted solely by the carrier.[14]

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[14] Aetna also argues that the doctrine of "the reasonable expectations of the insured" requires the court to consider evidence of Chemical Leaman's knowledge and insurance matters. *See* Aetna's Br. at 28-39. The court rejects this line of argument. The reasonable expectation of the insured doctrine is best understood as a justification for applying the rule of *contra proferentum* when a policy term is ambiguous. If a term is susceptible to two meanings, one precluding and one supporting coverage, then it is proper to assume that the insured will reasonably understand the terms to provide coverage. In this way, *contra proferentum* fulfills the insured's reasonable expectations.

Hatco Corp. v. W.R. Grace & Co., 801 F.Supp. 1334, 1349 (D.N.J.1992); *CPS Chem. Co. v. Continental Ins. Co.*, 222 N.J.Super. 175, 189-90, 536 A.2d 311 (App.Div.1988); *see also Diamond Shamrock Chem. v. Aetna Casualty & Sur. Co.*, 258 N.J.Super. 167, 209, 609 A.2d 440 (App.Div.1992) (suggesting, in dicta, that "only where it is clear that an insurance policy was 'actually negotiated or jointly drafted,' and where the policy holder had bargaining power and sophistication, is the rule of strict construction of policy terms against the insurer not invoked."). In the present case, Chemical Leaman played no role in negotiating or drafting the terms of the insurance policies.[15] The court, therefore, applies the rule of *contra proferentum* and holds that the term "sudden" in the pollution exclusion clause does not include a temporal aspect in its meaning. A long-term environmental pollution occurrence, such as the one involved here, falls within the exception to the pollution exclusion clause, so long as it was neither expected nor intended by the insured.

D. *The Parties' Cross-Motions for Summary Judgment*

Based on the above reading of the law, Chemical Leaman asks for a ruling that the pollution exclusion does not apply to the present case. The basis of Chemical Leaman's argument is that the pollution exclusion clause, because of the sudden and accidental exception, does no more than restate the scope of coverage under the basic occurrence-based terms of the policy.[16] In other words, the pollution exclusion clause, according to plaintiff, precludes coverage only if Chemical Leaman

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[15] Aetna has stipulated to this fact. *See* Joint Final Pretrial Order ¶¶ IV.5, 6. LMI, while refusing to stipulate to this fact, offers no evidence to dispute its truth.

[16] The court does not address plaintiff's argument that the insurers' official representations to state insurance commissions estop them from now advancing a more restrictive interpretation of the pollution exclusion clause. *See* Pl.'s Reply Br. at 38-41. This separate ground for summary judgment was first raised only in plaintiff's reply brief and will therefore not be considered. The court will construe the pollution exclusion clause according to New Jersey law.

expected or intended to cause soil and groundwater damage. Pl.'s Br. at 35.

[21] The problem with plaintiff's proposed reading is that the language of the pollution exclusion focuses not on damage but on "the discharge, dispersal, release or escape" of contaminants or pollutants. It is true that the court in *Broadwell* observed that the pollution exclusion clause was "simply a restatement of the definition of 'occurrence'—that is, that the policy will cover claims where the injury was 'neither expected nor intended.' " 218 N.J.Super. 516, 534, 528 A.2d 76 (App.Div.1987). Subsequent case law, however, has correctly characterized this observation as dicta and thus nonbinding. *See Hatco Corp.*, 801 F.Supp. at 1352. This court finds the language of the pollution exclusion clauses in defendants' policies to be clear and unambiguous in this regard.[17] The pollution exclusion precludes coverage when the insured has caused the discharge of contaminants or pollutants, unless the discharge was neither expected nor intended from the standpoint of the insured.[18] *See Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156-58 (4th Cir.1992) (applying New Jersey law), *cert. denied*, — U.S. ——, 113 S.Ct. 78, 121 L.Ed.2d 42 (1992); *Hatco Corp. v. W.R. Grace & Co.*, 801 F.Supp. 1334, 1351 (D.N.J.1992). The insurer bears the burden of proving this exclusion. *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181-82 (3d Cir.1991) (applying Delaware law). In light of the above legal

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[17] The pollution exclusion clauses in LMI's policies in effect from April 1, 1971 to April 1, 1974, and from April 1, 1977 to April 1, 1985 applied to "seepage, pollution or contamination" rather than "discharge, dispersal, release or escape." The court finds that the former language does not lead to any different result on the issues currently before it. Nor do the parties make any such argument.

[18] In *Hatco Corp.*, the court held that New Jersey law does not require the "insured to be aware of the harmful nature of the pollutants when they were discharged or released" in order for the pollution exclusion to apply. 801 F.Supp. at 1352. In light of the finding that it is undisputed that Chemical Leaman knew of the hazardous environmental effect of the contaminants in the rinsewater, the court does not reach this legal issue.

analysis, plaintiff is wrong in arguing that the sudden and accidental exception to the pollution exclusion clause is coextensive with the policy's basic coverage under the occurrence clause. Rather, "the pollution exclusion clause shifted the critical focus from damage to discharge, but did not, at the same time, introduce a temporal element into that inquiry through the use of the word 'sudden' " *Id.* at 1201. Accordingly, the court must deny plaintiff's motion for summary judgment.

[22] The court, however, does grant partial summary judgment to defendants as to *soil damage* on all policies containing a pollution exclusion. As discussed previously, the record is replete with evidence that Chemical Leaman intended to discharge contaminants into the soil at the Bridgeport site. *E.g.* Elston Dep. at 137; Middleton Dep. at 125. Indeed, plaintiff admits that Chemical Leaman contemplated such discharges as part of the design of its rinsewater treatment system with unlined ponds and lagoons. Pl.'s Reply Br. at 18-19. These discharges of contaminants into the soil do not fall within the "sudden and accidental" exception to the pollution exclusion, and Chemical Leaman is therefore barred from recovering from the carriers under the relevant policies for any sums used to remediate soil damage. Whether Chemical Leaman intended to discharge contaminants into the groundwater remains a genuine issue of dispute. Summary judgment on this issue must, therefore, be denied.

V. Owned-Property Exclusion

In its March 31, 1992 opinion, this court held "that the owned-property exclusion does not apply to remedial measures taken by Chemical Leaman that are designed to correct injury or to prevent further injury to the ground and surface waters in the vicinity of its Bridgeport facility." *Chemical Leaman Tank Lines, Inc. v. Aetna,* 788 F.Supp. 846, 853 (D.N.J.1992). LMI asks for reconsideration of this holding in light of the New Jersey Supreme Court's opinion in *State v. Signo Trading Int'l,* 130 N.J. 51, 612 A.2d 932 (1992). LMI's principal contention is that *Signo Trading* requires an

apportionment for onsite versus offsite soil contamination. LMI Reply Br. at 24.[19] The court, after careful consideration of the *Signo Trading* opinion, finds that its prior holding stands as good law. It is implicit in the court's decision that the carriers will not be obligated to indemnify Chemical Leaman for cleanup costs that are intended to remediate damage at the Bridgeport site. The resolution of this issue must await trial.

VI. Late Notice

[23] Defendants' insurance policies required, as a condition precedent to coverage, that the insured provide "as soon as practicable" written notice in the event of an occurrence or accident. Both Aetna and LMI disclaim coverage on the basis of these provisions, asserting that Chemical Leaman failed to give timely notice.[20] Indeed, plaintiff concedes that Chemical Leaman is in breach of the notice clauses. Tr. of Oral Argument at 28-29. However, this admission does not end the inquiry. New Jersey law is clear that an insurer may deny coverage on the basis of a notice clause only after proving not only that the insured breached but also that the insurer suffered a likelihood of appreciable prejudice as a result. *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 94, 237 A.2d 870 (1968).

Thus, the court addresses whether Chemical Leaman's late notice caused defendants to suffer a likelihood of appreciable

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[19] LMI concedes that no apportionment of costs for groundwater contamination cleanup is required. LMI's Reply Br. at 24.

[20] Defendants also seek to avoid coverage on the basis of the equitable defenses of laches and estoppel. New Jersey law considers laches to be identical to the late notice defense. *Allstate Ins. Co. v. Howard Sav. Inst.*, 127 N.J.Super. 479, 489-90, 317 A.2d 770 (Ch.Div.1974). New Jersey law also requires a showing of prejudice for carrier to succeed on an estoppel defense. *See Merchants Indem. Corp. v. Eggleston*, 37 N.J. 114, 127-28, 179 A.2d 505 (1962). The court, therefore, reaches the exact same results on the parties' laches and estoppel defenses as it does below on the late notice defense.

prejudice. Timely notification pursuant to a notice clause allows an insurer to investigate the merits of both the insured's claim against the carrier and the underlying claim against the insured that allegedly triggers coverage. In light of these goals, the court in *Morales v. National Grange Mut. Ins. Co.*, 176 N.J.Super. 347, 423 A.2d 325 (Law Div.1980), focused on two factors in determining whether a likelihood of appreciable prejudice exists.[21] The first is "whether substantial rights have been irretrievably lost by virtue of the failure of the insured to notify the carrier in a timely fashion." *Id.* at 355, 423 A.2d 325. Some of the substantial rights implicated by late notice include "the availability of witnesses, the ability to discover information regarding the location of the accident, any physical changes in the scene during the delay, the existence of official reports concerning the occurrence, the preparation and preservation of demonstrative and illustrative evidence such as vehicles or photographs, and the ability of experts to reconstruct the scene." *Id.* In making its case, the insurer "must establish more than the mere fact that it cannot employ its normal procedures in investigating and evaluating the claim." *Id.* Rather, it must show that substantial rights have been *irretrievably* lost.

The second factor is "the likelihood of success of the insurer in defending against the" underlying claim. This inquiry implicates the notice clause's function of allowing the carrier to assume the defense of the underlying claim, if it so desires. As the court in *Morales* noted:

> In some cases the liability of the insured and the resulting damages are so clear that it would be unfair to preclude the plaintiff from recovering against the carrier. For that reason the carrier should be

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[21] The court follows the lead of two other district courts in applying *Morales'* analysis of the law of appreciable prejudice to an environmental insurance case. *See Hatco Corp. v. W.R. Grace & Co.*, 801 F.Supp. 1334, 1371-72 (D.N.J.1992); *Witco Corp. v. Travelers Indemnity Co.*, Civ. No. 86-2907, 1987 WL 65060 **14-16, 1987 U.S. Dist. LEXIS 14295 **38-40 (D.N.J. May 1, 1987).

> required to show the likelihood that it would have had a meritorious defense had it been informed of the accident in a timely fashion.

Id. at 355-56, 423 A.2d 325.

A. *Substantial Rights Irretrievably Lost*

Defendants present two principal arguments on the irretrievable loss of substantial rights. First, they contend that the death of witnesses and witnesses' loss of memory resulting from the passage of time have seriously prejudiced their ability to dispute their coverage obligations under the policies. Second, defendants maintain that the 1977 draining and filling of the ponds and lagoons at the Bridgeport site also deprived defendants of evidence that would have enhanced their ability to dispute coverage.

[24] Plaintiff seeks indemnification for its cleanup liabilities and defense costs incurred pursuant to the EPA's CERCLA claim. It is, therefore, beyond dispute that notice should have been given to defendants, at the earliest, by 1984, when the EPA placed the Bridgeport site on the Superfund national priorities list. The court finds that the evidence in the record fails to establish that defendants suffered a likelihood of appreciable prejudice in their ability to contest coverage. Defendants have not shown that any material witnesses have died since 1984. Nor have they proven that the fading or failure of witnesses' memory has irretrievably harmed their ability to advance their case against Chemical Leaman. In addition, the material attached to the current summary judgment motions, culled from the files of Chemical Leaman, the insurers, government agencies, and various other entities, shows that a wealth of relevant documentary evidence remains intact. Finally, defendants could not have obtained evidence from the original ponds and lagoons at the Bridgeport site in 1984, with or without timely notice, because the site was drained and backfilled by 1977. In sum, defendants are currently able to mount a strong, well-documented case against coverage, the crux of which is that Chemical Leaman expected or intended from 1960 to 1975 to cause soil and groundwater

contamination. The insurers have not submitted proof that they would have been in any better position to make this case beginning in 1984 upon timely notice rather than in 1988 or 1989.

B. *Likelihood of Success in Defending the Underlying Claim*

[25] The second *Morales* factor concerns the defendants' likelihood of success in the underlying claim against Chemical Leaman if they had taken over defense of the claim upon timely notice. Chemical Leaman, as owner and operator of the Bridgeport facility, is strictly liable under CERCLA for damages for injury to, destruction of, or loss of natural resources, as well as for the reasonable costs of assessing such damage to natural resources, and all costs of removal, remediation, or other necessary response costs. Chemical Leaman's liability for these damages is retroactive, joint, and several, and imposed regardless of fault. Joint Final Pretrial Order ¶ IV.36. Defendants do not contend that a meritorious challenge exists to the findings, made in the 1985 consent order, that four residences located approximately 100 feet north of the Bridgeport site show contamination in their drinking water wells, and that the drinking water wells of at least three more persons are threatened by the direction and proximity of the contamination. Nor do defendants assert that there is a meritorious defense to the EPA's allegation that the presence of hazardous substances at the Bridgeport facility and their migration to surrounding soils and groundwater constitute a release within the meaning of section 101(22) of CERCLA, 42 U.S.C. § 9601(22). Accordingly, the court finds that defendants have not shown a likelihood of success in defending Chemical Leaman against claims under CERCLA.

Defendants also ask this court to find that timely notice would have resulted in a likelihood that the insurance carriers would have reached a more favorable settlement. However, defendants fail to demonstrate what better arrangement the insurance carriers would have been able to obtain if they had assumed Chemical Leaman's defense upon timely notice. *Cf.*

Witco Corp. v. Travelers Indem. Co., Civ. No. 86-2907, 1987 U.S.Dist. LEXIS ** 44-45 (D.N.J. May 1, 1987).

[26] Finally, defendants present evidence tending to show that Chemical Leaman's *implementation* of the cleanup of the Bridgeport site pursuant to its liability under CERCLA has led to *higher* cleanup costs than would have resulted had the insurance carriers been involved in the case following timely notice. In particular, defendants claim that the work of Environmental Resources Management, Inc., the firm hired by Chemical Leaman to assist in the CERCLA cleanup, was substandard, resulting in increased costs. The court finds that this evidence, while irrelevant to the notice inquiry of whether defendants suffered a likelihood appreciable prejudice, may nevertheless go to the jury for its determination of the amount of the cleanup costs pursuant to CERCLA for which defendants are liable. Defendants' policies obligate the carriers to indemnify Chemical Leaman only for "all sums which the insured shall become legally obligated to pay as damages ... caused by an occurrence." Increased cleanup costs incurred by plaintiff as a result of Chemical Leaman's or its agent's substandard work are not "*caused* by an occurrence." Rather, they are caused by the insured's allegedly poor handling of its cleanup obligations. These costs are more akin to business losses than to tort liability. And, as the Appellate Division has emphasized, liability policies provide coverage for the insured's "tort liability for [property] damages to others and not for economic or business losses suffered by the insured." *Broadwell Realty Serv. Inc. v. Fidelity & Casualty Co.*, 218 N.J.Super. 516, 526, 528 A.2d 76 (App.Div.1979); *cf. Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 240, 405 A.2d 788 (1979). Accordingly, increased cleanup costs found by the jury to be caused by plaintiff's substandard work may not be recovered under defendants' policies.

In conclusion, the court recognizes that the law should not endure lightly an insured's failure to make timely notification under a policy. Indeed, a four to five year delay strains the limits of judicial tolerance. *But see Peskin v. Liberty Mut. Ins. Co.*, 219 N.J.Super. 479, 530 A.2d 822 (App.Div.1987)

(remanding case for further findings on a novel appreciable prejudice theory where insured waited 11 years to give notice of claim). However, New Jersey courts have consistently required carriers to establish that they suffered a likelihood of appreciable prejudice before requiring the insured to forfeit its coverage despite the premiums it already paid. Defendants have not submitted sufficient evidence to create a genuine dispute on whether they have satisfied their burden. Accordingly, the court grants plaintiff's summary judgment motion on the late notice issue.

VII. Failure to Cooperate

[27] New Jersey law provides that an insurance carrier may disclaim coverage pursuant to a cooperation clause only if it proves (1) that the insured breached the cooperation clause and (2) that the carrier suffered a likelihood of appreciable prejudice as a result of this breach. *Solvents Recovery Serv. v. Midland Ins. Co.*, 218 N.J.Super. 49, 54, 526 A.2d 1112 (App.Div.1987). First, the court must grant Chemical Leaman's motion for summary judgment on the cooperation clause as against Aetna. Aetna has stipulated that:

> By at least May 23, 1988, and until April 12, 1989, when Chemical Leaman instituted this lawsuit, Aetna investigated Chemical Leaman's claim. Pursuant to this investigation, Aetna has interviewed four Chemical Leaman personnel and has reviewed Chemical Leaman's files and records. Chemical Leaman cooperated with this investigation and provided information which Aetna requested until Chemical Leaman determined that legal action was necessary.

Joint Final Pretrial Order ¶ IV.43. Aetna is bound by this stipulation. Accordingly, the court finds that Chemical Leaman did not breach the cooperation clause in its policies with Aetna.

[28] Chemical Leaman's motion for summary judgment on the cooperation clause in the LMI policies must also succeed.

Chemical Leaman notified LMI of its claim on March 30, 1989. Chemical Leaman filed the present suit against LMI on April 12, 1989. Even assuming that plaintiff failed whatsoever to cooperate with LMI between these two dates, the court must find that LMI suffered no likelihood of appreciable prejudice. LMI has submitted no evidence of witnesses dying or witnesses' memories fading during this period. Nor has LMI shown that Chemical Leaman altered the Bridgeport site in any way that hampered LMI's ability to investigate the underlying CERCLA claim against Chemical Leaman or Chemical Leaman's claim against LMI. Based on these findings, the court grants Chemical Leaman's motion for summary judgment as against LMI on the cooperation clause issue.

VIII. Aetna's Duty to Defend

Plaintiff seeks recovery from Aetna for certain costs incurred in connection with the defense of the underlying CERCLA suit. In particular, these costs include: (1) studies and tests made in connection with the preparation of the RI/FS; (2) engineering and other expert fees; (3) attorneys fees associated with the EPA's administrative process; and (4) administrative and oversight costs reimbursable to the EPA. Pl.'s Br. at 55. Plaintiff also asks for a declaration that Aetna is presently obligated under its policies to provide Chemical Leaman with a defense. Since being notified on April 18, 1988, Aetna has refused to defend Chemical Leaman.

A. *Pre-Notice Defense Costs*

[29] A threshold issue involves whether Aetna can be held responsible for the insured's defense costs incurred before April 18, 1988. The court holds that it cannot. In *SL Industries v. American Motorists Insurance Co.*, the New Jersey Supreme Court ruled "that the duty to defend is triggered by facts *known* to the insurer." 128 N.J. 188, 199, 607 A.2d 1266 (1992) (emphasis in original). According to the court:

> the insured being sued is responsible for promptly conveying to its insurance company the information

> that it believes will trigger coverage. If it conveys that information properly and promptly, it will be reimbursed for previously expended defense costs. However, if the insured does not properly forward the information to the insurance company, the insured cannot demand reimbursement from the insurer for defense costs the insurer had no opportunity to control.... [W]hen the insured's delay in providing relevant information prevents the insurer from assuming control of the defense, the insurance company is liable only for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend.

Id. at 199-200, 607 A.2d 1266. Chemical Leaman has already conceded that it breached the notice clause. Moreover, the EPA's placement of the Bridgeport site on the Superfund national priorities list in 1984 and the institution of the CERCLA action in 1985 clearly constituted information relevant to triggering Aetna's coverage and duty to defend. Therefore, the court holds that Aetna is not responsible for reimbursing plaintiff for defense costs incurred by Chemical Leaman prior to April 18, 1988.

B. *Post-Notice Defense Costs*

In *Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Inc.*, 98 N.J. 18, 483 A.2d 402 (1984), the New Jersey Supreme Court defined an insurance carrier's duty to defend under provisions similar to the ones in Aetna's policies:

> It is evident on the face of the "duty to defend" clause that the duties to indemnify and to defend are closely related and that neither duty exists except with respect to occurrences for which the policy provides coverage. It is irrelevant to the duty to defend whether the suit is well founded or groundless, ... but the duty extends only to claims within the coverage of the policy. Stated another way, the duty to defend extends only to claims on which there

> would be a duty to indemnify in the event of a judgment adverse to the insured.

Id. at 22, 483 A.2d 402 (citation omitted). A carrier's obligations in a particular case are "generally determined by comparing the allegations in the complaint with the language of the policy. When the two correspond, the insurer must defend the suit." *SL Indus. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 197, 607 A.2d 1266 (1992) (citation omitted). Thus, "[t]he duty to defend comes into being when the complaint states a claim constituting a risk insured against." *Danek v. Hommer*, 28 N.J.Super. 68, 77, 100 A.2d 198 (App.Div.1953), *aff'd*, 15 N.J. 573, 105 A.2d 677 (1954).

[30] A particular problem arises when the complaint in the underlying litigation does not contain allegations which, if proven at trial, would suffice to establish coverage. The New Jersey Supreme Court addressed this scenario in *Burd v. Sussex Mutual Insurance Co.*, 56 N.J. 383, 267 A.2d 7 (1970). "[W]hen coverage ... depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured, the duty to defend may depend upon the actual facts and not upon the allegations in the complaint." *Id.* at 388, 267 A.2d 7; *see also Hartford v. Aetna*, 98 N.J. at 23-24, 483 A.2d 402. Thus, New Jersey law contemplates that the insurance carrier may refrain from actually defending the insured in the underlying litigation where the underlying litigation will not resolve an issue central to coverage. *See CPS Chem. Co. v. Continental Ins. Co.*, 203 N.J.Super. 15, 495 A.2d 886 (App.Div.1985). The primary reason for the *Burd* rule is to preclude the possibility of a conflict between the interests of the carrier and the insured if the carrier assumes the defense in an underlying suit that will not necessarily resolve all outstanding issues as to coverage. "Whenever the carrier's position so diverges from the insured's that the carrier cannot defend the action with complete fidelity to the insured, there must be a proceeding in which the carrier and the insured, represented by counsel of their own choice, may fight out their differences." *Burd*, 56 N.J. at 391, 267 A.2d 7.

The *Burd* rule, however, does not "free the carrier from its covenant to defend, but rather translate[s] its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay." *Id.* at 390, 267 A.2d 7. The practical effect of this rule is that "an insured must initially assume the costs of defense itself, subject to reimbursement by the insurer if it prevails on the coverage question." *Hartford v. Aetna,* 98 N.J. at 24, 483 A.2d 402.

[31] In the present case, the underlying CERCLA claim is grounded in strict liability. A comparison of the facts necessary to establish liability under the CERCLA complaint with the facts necessary to establish coverage under Aetna's policies reveals a critical discrepancy on the issue of Chemical Leaman's intent. The issue of intent plays no role in establishing CERCLA liability. *Hatco Corp.,* 801 F.Supp. 1334, 1365 (D.N.J.1992). But under Aetna's policies, Chemical Leaman may obtain coverage only if it can show it did not intend to cause the environmental damage. Accordingly, the *Burd* rule controls Aetna's obligations to fulfill its duty to defend. If the present action establishes coverage, then Aetna must reimburse Chemical Leaman for its post-notice defense costs. The court, however, must deny plaintiff's motion for summary judgment on Aetna's present duty to defend. *Id.* 801 F.Supp. at 1364-66; *Heldor Indus., Inc. v. Atlantic Mut. Ins. Co.,* 229 N.J.Super. 390, 399, 551 A.2d 1001 (App.Div.1988); *CPS Chem. Co., Inc. v. Continental Ins. Co.,* 203 N.J.Super. 15, 21, 495 A.2d 886 (App.Div.1985).

IX. Conclusion

Based on the foregoing analyses, the court grants in part and denies in part the parties' cross-motions for summary judgment. The parties are also ordered to submit on the day of trial a joint statement of material facts deemed established in this opinion pursuant to Federal Rule of Civil Procedure 56(d). An appropriate order will be entered.

ORDER

This matter having come before the court on the cross-motions of the parties for summary judgment, as well on the various motions of the parties for leave to file briefs in excess of the established page limits;

The court having heard oral argument on the parties' cross-motions for summary judgment on November 23, 1992 and having carefully considered the submissions of the parties; and

For the reasons stated in the court's opinion of this date;

IT IS on this 10th day of March 1993 hereby

ORDERED that the motion of plaintiff Chemical Leaman Tank Lines, Inc. ("Chemical Leaman"), for summary judgment is GRANTED in part and DENIED in part, in that:

(a) There remain genuine issues of material fact on whether Chemical Leaman expected and intended to cause soil and ground water damage; and

(b) There remain genuine issues of material fact on whether the continuous trigger theory is applicable to the present case; and

(c) Chemical Leaman may not recover for soil contamination on any of defendants' policies that contain a pollution exclusion; and

(d) There remain genuine issues of material fact on whether Chemical Leaman may recover for groundwater contamination on any of defendants' policies that contain a pollution exclusion; and

(e) Chemical Leaman is not barred from coverage under defendants' policies by the policies' notice clauses; and

(f) Chemical Leaman is not barred from coverage under defendants' policies by the defense of laches; and

(g) Chemical Leaman is not barred from coverage under defendants' policies by the policies' cooperation clauses; and

(h) Chemical Leaman is not barred from coverage under defendants' policies by the defense of estoppel; and

(i) Chemical Leaman may not recover from Aetna Casualty and Surety Co. ("Aetna") reimbursements for defense costs incurred by Chemical Leaman prior to April 18, 1988; and

(j) Aetna' duty to defend Chemical Leaman is not presently triggered, but rather must await the outcome of the present trial of Aetna's duty to indemnify; and

IT IS FURTHER ORDERED that the cross-motion of defendant Aetna is GRANTED in part and DENIED in part, in that:

(a) There has occurred property damage to trigger Aetna's policy in effect from April 1, 1960 to April 1, 1961; and

(b) Chemical Leaman may not recover under Aetna's policies in effect prior to April 1, 1960; and

(c) There remain genuine issues of material fact on whether Chemical Leaman expected and intended to cause soil and groundwater damage; and

(d) There remain genuine issues of material fact on whether the continuous trigger theory is applicable to the present case; and

(e) Chemical Leaman may not recover for soil contamination on any of Aetna's policies that contain a pollution exclusion; and

(f) There remain genuine issues of material fact of whether Chemical Leaman may recover for groundwater contamination on any of Aetna's policies that contain a pollution exclusion; and

(g) Chemical Leaman is not barred from coverage under Aetna's policies by the policies' notice clauses; and

(h) Chemical Leaman is not barred from coverage under Aetna's policies by the policies' cooperation clauses; and

IT IS FURTHER ORDERED that the cross-motion of defendants Robin Anthony Gildart Jackson, an Underwriter at Lloyds, London, *et al.* ("LMI"), is GRANTED in part and DENIED in part, in that:

(a) Chemical Leaman's 12G Statement of Material Facts Not In Dispute will not be stricken; and

(b) Chemical Leaman bears the burden of proof for establishing that it neither expected nor intended to cause soil and groundwater damage; and

(c) There remain genuine issues of material fact on whether Chemical Leaman expected and intended to cause soil and groundwater damage; and

(d) Chemical Leaman may not recover for soil contamination on any of LMI's policies that contain a pollution exclusion; and

(e) There remain genuine issues of material fact on whether Chemical Leaman may recover for groundwater contamination on any of LMI's policies that contain a pollution exclusion; and

(f) Reconsideration of this court's previous ruling on the owned-property exclusion is not warranted; and

(g) Chemical Leaman is not barred from coverage under LMI's policies by the policies' notice clauses; and

(h) Chemical Leaman is not barred from coverage under LMI's policies by the defense of laches; and

(i) Chemical Leaman is not barred from coverage under LMI's policies for pre-notice costs; and

IT IS FURTHER ORDERED that the parties shall submit to the court on March 15, 1993, a statement of material facts deemed established pursuant to Federal Rule of Civil Procedure 56(d) by the court's opinion of this date; and

IT IS FURTHER ORDERED that LMI's cross-motion for summary judgment that the absolute pollution exclusion in all the post-April 1, 1985 policies is DENIED as moot, in that Chemical Leaman has withdrawn all claims as against LMI under these policies; and

IT IS FURTHER ORDERED that Aetna's motion for leave to file a summary judgment brief exceeding 40 pages in GRANTED; and

IT IS FURTHER ORDERED that LMI's motion for leave to file a summary judgment brief exceeding 40 pages in GRANTED; and

IT IS FURTHER ORDERED that plaintiff's motion for leave to file a reply and opposition brief exceeding forty pages is GRANTED; and

IT IS FURTHER ORDERED that Aetna's motion for leave to file a reply and opposition brief in excess of 40 pages is GRANTED; and

IT IS FURTHER ORDERED that LMI's motion for leave to file a reply and opposition brief in excess of 15 pages is GRANTED.

No costs.

CHEMICAL LEAMAN TANK LINES, INC., Plaintiff,

v.

THE AETNA CASUALTY & SURETY COMPANY; Robin Anthony Gildart Jackson, as representative Underwriter at Lloyd's, London, et al., Defendants.

Civ. A. No. 89-1543 (SSB).

United States District Court,
D. New Jersey.

March 31, 1992.

Owner and operator of facility brought suit against its insurers seeking coverage for cleanup costs. On parties' partial summary judgment motions, the District Court, Brotman, J., held that: (1) cleanup costs constituted "damages" on account of "property damage" within meaning of comprehensive general liability (CGL) and excess liability policies; (2) owned-property exclusion did not apply to remedial measures designed to correct injury and to prevent further injury; and (3) fact questions precluded summary judgment on issue of whether there was coverage for contamination after date insured received letter from New Jersey Department of Environmental Protection (NJDEP).

Plaintiff's motion granted and defendants' motions denied.

1. Federal Courts k381

Federal court must apply choice of law rules of state in which it sits.

2. Insurance k147(2)

Under New Jersey law, law of place of contract will govern determination of rights of parties under insurance policy unless dominant and significant relationship of another state to the parties and underlying issues dictates that this basic rule should yield.

3. Insurance k147(3)

Law of New Jersey, where facility which generated hazardous substances was located, governed interpretation of policies issued to facility owner, even though facility owner's principal place of business was in Pennsylvania and it employed Pennsylvania insurance brokers to procure and negotiate the policies.

4. Insurance k434(1)

Under New Jersey law, cleanup costs which insured owner and operator of facility was obligated to pay pursuant to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) with respect to ground and surface water contaminated in the vicinity of, but not at, its facility constituted "damages" on account of "property damage" within meaning of comprehensive general liability (CGL) and excess liability policies. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

5. Insurance k434(1)

Under New Jersey law, owned-property exclusion of comprehensive general liability (CGL) and excess liability policies did not apply to remedial measures taken by insured owner and operator of facility that were designed to correct injury and to prevent further injury to ground and surface waters in vicinity of the facility.

6. Insurance k178.6

Under "occurrence" policy, insured is not entitled to coverage when it is aware of occurrence prior to policy.

7. Federal Civil Procedure k2481

Although insured owner and operator of facility had received letter from New Jersey Department of Environmental

Protection (NJDEP) informing owner of groundwater contamination, there were fact questions as to whether damage sustained by date of later consent order was capable of being known by insured or whether owner continued to engage in continuous pollution of ground and surface waters after receipt of letter, precluding summary judgment under "occurrence" policies on ground that insurer had actual knowledge of the contamination upon receipt of the letter.

Stephen D. Houck, Donovan, Leisure, Newton & Irvine, New York City, Stuart M. Feinblatt, Philip A. Bramson, Sills, Cummis, Zuckerman, Radin, Tischmann, Epstein & Gross, Newark, N.J., for plaintiff.

Brian J. Coyle, Peter E. Mueller, Hardwood Lloyd, Hackensack, N.J., for defendant Aetna Cas. & Sur. Co.

John C. McAndrews, Hannah M. O'Driscoll, Mendes & Mount, New York City, William J. Hanley, Ronca, McDonald & Hanley, Livingston, N.J., for defendants Jackson and London Market Insurers.

OPINION

BROTMAN, District Judge.

Presently before the court are the following partial summary judgment motions:

1) plaintiff Chemical Leaman Tank Lines, Inc. ("Chemical Leaman") moves that this court find:

a) that the cleanup costs which it is obligated to pay pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") with respect to ground and surface water contamination in the vicinity of its Bridgeport, New Jersey facility constitute "damages" on account of "property damage" within the meaning of the relevant insurance policies issued by defendants; and

b) that the owned-property exclusion does not apply to remedial measures taken by Chemical Leaman that are designed to correct injury or to prevent further injury to the ground and surface waters of New Jersey;

2) defendant Aetna Casualty & Surety Co. ("Aetna") and, in a separate motion, defendants Robin Anthony Gildart Jackson, as representative Underwriter at Lloyd's London ("Jackson") and 48 London market insurance companies ("London Market Insurers") move that this court find:

a) that Pennsylvania law governs the policy interpretation issues in this action; and

b) that there is no insurance coverage for the environmental contamination at issue in this action under any insurance policy in effect on or after January 7, 1981.

I. FACTS AND PROCEDURE

Chemical Leaman filed this declaratory judgment and damages action on April 12, 1989 arising from defendants' failure to provide coverage pursuant to certain comprehensive general liability ("CGL") and excess liability insurance policies. Aetna issued the CGL policies to Chemical Leaman for the period April 1, 1959 through April 1, 1985. Jackson and the London Market Insurers issued umbrella and excess liability insurance to Chemical Leaman for the period from April 1, 1958 through April 1, 1986.

Under Aetna's and the Jackson and the London Market Insurers' policies, the insurers agreed to pay on behalf of the insured all sums which the insured became legally obliged to pay as damages because of property damage.[1] Aetna's

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[1] Under the terms of each insurance policy issued by Aetna to Chemical Leaman for the period April 1, 1967 through April 1, 1973, property damage was defined as "injury to or destruction of tangible property." For Aetna's policies issued for the period April 1, 1973 through April 1, 1985, property damage was defined as:

(Footnote continued)

policies excluded coverage for damage to property owned or occupied by, rented to, used by, or in the care, custody or control of the insured.

For Aetna's policies issued after April 1, 1973 through the expiration of Aetna's coverage on April 1, 1985, the term "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.... All bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." For the Jackson and London Market Insurers' policies which were in effect on or after January 1, 1980, "occurrence" was defined as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in ... property damage ... during the policy period." For these policies, Aetna and Jackson and the London Market Insurers were responsible to pay all sums for property damage arising out of each "occurrence."

Chemical Leaman is a tank truck company specializing in the transportation of various chemicals and other liquids.

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1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or 2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Prior to April 1, 1967, the policies issued by Aetna to Chemical Leaman used the terms "damages because of injury to or destruction of property" as opposed to "property damage."

Under the terms of the Jackson and the London Market Insurers' policies in effect as of January 1, 1980, "property damage" was defined as "loss of or direct damage to or destruction of tangible property" and "damages" was defined as "damages for loss of use of property resulting from property damage (other than property owned by the Name Assured)."

Since 1960, it has operated its Bridgeport truck terminal facility providing tank truck cleaning services, located in Logan Township, Gloucester County, New Jersey. In February, 1969, pursuant to complaints of odors emanating from the cleaning process and the on-site ponds and lagoons in which rinse water from the cleaning process was disposed of, the New Jersey Department of Health issued a Departmental Order to Chemical Leaman to construct a waste water treatment and/or disposal plant as a remedy for the odor problem. After Chemical Leaman installed a new rinse water containment system, the ponds and lagoons were drained and filled.

On or about January 7, 1981, as a result of a preliminary investigation, the New Jersey Department of Environmental Protection ("NJDEP") requested that Chemical Leaman undertake a hydrogeologic investigation to determine the extent and degree of groundwater contamination resulting from its facility operations. The hydrogeologic investigation indicated that certain areas of the groundwater at and in the vicinity of the facility were contaminated with hazardous substances. The EPA concluded that the ponds and lagoons ("the Site") were the primary sources of groundwater contamination.

In September 1984, the Site was placed on the National Priorities List of Superfund sites pursuant to Section 105 of CERCLA (42 U.S.C. § 9605). The EPA has alleged that the presence of hazardous substances at the facility and their migration to surrounding soils and groundwater constitute a release within the meaning of Section 101(22) of CERCLA (42 U.S.C. § 9601(22)). As owner and operator of the Bridgeport facility, Chemical Leaman is strictly liable under CERCLA for damages for injury to, destruction of, or loss of natural resources, as well as the reasonable costs of assessing such damage to natural resources, and for all costs of removal or remedial action incurred by the United States or the state of New Jersey. Chemical Leaman's liability for these damages is retroactive, joint and several, and is imposed regardless of fault. See Section 107 of CERCLA (42 U.S.C. § 9607).

In July, 1985, Chemical Leaman entered into an Administrative Order on Consent ("1985 Order") with the EPA pursuant to CERCLA.[2] The 1985 Order directed Chemical Leaman to conduct a Remedial Investigation and Feasibility Study ("RI/FS") of the groundwater. The 1985 Order also provided substantial civil penalties and punitive damages amounting to three times the total costs incurred by the government should Chemical Leaman fail to take proper action. Chemical Leaman has incurred substantial costs in connection with its conducting of the groundwater RI/FS. Because the RI/FS contained sufficient groundwater data to determine an appropriate remedy, the groundwater remediation is currently proceeding.

On or about April 18, 1988, Chemical Leaman filed a notice of claim under some of the Aetna policies, which included a description of the investigation and remediation work undertaken by Chemical Leaman at the Site. On or about March 30, 1989, Chemical Leaman notified Jackson and the London Market Insurers of its claim relating to the Site. The defendants have refused to defend or indemnify Chemical Leaman for the investigation and remediation costs incurred at the Site or for any future costs Chemical Leaman will incur in connection with the cleanup or remediation of the Site.

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[2] The 1985 Order contained, *inter alia*, the following findings:

1) four residences located approximately 100 feet north of the terminal site showed contamination in their drinking water wells; and

2) the drinking water wells of at least three more persons were threatened by the direction and proximity of the contamination.

Based on the Administrative Record and the 1985 Order, the Regional Administrator determined that the release and the threatened release of one or more of the hazardous substances from the Bridgeport terminal facility may present "an imminent and substantial endangerment to the public health and welfare and the environment."

II. DISCUSSION

Summary Judgment Standard

The standard for granting summary judgment is a stringent one. A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Hersh v. Allen Prods. Co.*, 789 F.2d 230, 232 (3d Cir.1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir.1983). In deciding whether there is a disputed issue of material fact the court must view all doubt in favor of the non-moving party. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n. 2 (3d Cir.1983), *cert. denied*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir.1972). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Supreme Court decisions mandate that "a motion for summary judgment must be granted unless the party opposing the motion can produce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir.1987) (Becker, J., concurring) (citing *Anderson*, 477 U.S. 242, 106 S.Ct. 2505, and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Moreover, once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511.

1) New Jersey or Pennsylvania Law?

Defendants contend that Pennsylvania law should govern the policy interpretation issues in this action. They contend that since Chemical Leaman's principal place of business is in Pennsylvania and that since Chemical Leaman employed Pennsylvania insurance brokers to procure and negotiate the insurance policies at issue, Pennsylvania law should apply. Moreover, defendants contend that none of its policies at issue applied solely to Chemical Leaman's Bridgeport terminal facility but to all of Chemical Leaman's operations throughout the United States and unless Pennsylvania law applies to all sites, these policies may be interpreted in diverse, if not contradictory ways. Aetna also maintains that all of its policies at issue in this litigation were contracted for in Pennsylvania.

[1, 2] A federal court must apply the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941); *Shuder v. McDonald's Corp.*, 859 F.2d 266, 269 (3d Cir.1988). In New Jersey, "the law of the place of the contract will govern the determination of the rights of the parties" under an insurance policy "unless the dominant and significant relationship of another state to the parties and the underlying issues dictates that this basic rule should yield." *State Farm Automobile Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 37, 417 A.2d 488 (1980).

This court recently held, in *Leksi v. Federal Ins. Co.*, 736 F.Supp. 1331 (D.N.J.1990) that:

> [i]n the absence of a choice of law provision, the state where the toxic waste comes to rest is the state whose law will apply, provided that it was reasonably foreseeable that the waste would come to rest there. With the exception of situations in which the adjoining states dispute their boundary, the rule is elegant in its simplicity and properly recognizes that the host state's interest in its environment is superior to that of the law of the place of the contract.

Id. at 1336; *accord Transamerica Insurance Company v. Durkin*, 1991 WL 246927 at *3 (E.D.Pa. November 19, 1991). *Leksi* involved a coverage dispute under CGL policies regarding the insurers' duty to defend and indemnify the insured against claims asserted in several enforcement actions relating to the cleanup of New Jersey landfills.[3] Byproducts of the *Leksi* plaintiff's manufacturing process related to production of dentures were transported to various landfills in New Jersey from its plants in Pennsylvania. This court held that even though the insurance policies were negotiated, signed and delivered in Pennsylvania, New Jersey law should apply because of New Jersey's interest in the cleanup of its landfills. This site-specific rule of law prevents insurance companies from securing restrictive interpretations of contracts based on the place of contracting. *Accord Transamerica* at *2.

[3] The present case provides even a stronger argument for applying New Jersey law than do the facts presented in *Leksi* since Chemical Leaman's terminal facility which generated the hazardous substances is located in New Jersey. If a host state, New Jersey in this instance, can protect its environment by applying its laws to corporations with plants and facilities outside the state, there is no reason it should not apply these same laws to corporations with plants and facilities within its borders.

Certainly, it is reasonably foreseeable that the waste generated by a New Jersey plant would come to rest in New Jersey. *Accord Johnson Matthey v. Pennsylvania Manufacturers' Association*, 250 N.J.Super. 51, 62-63, 593 A.2d 367 (App.Div.1991) (citing *Leksi* with approval and applying New Jersey law rather than the law of the place of contracting because quality of New Jersey's interest in environment

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[3] The *Leksi* plaintiff is a party-defendant in *New Jersey Department of Environmental Protection v. Gloucester Environmental Management Services, Inc.*, Civil No. 84-152(SSB) (D.N.J.) and in United States v. Rohm & Haas Co., 721 F.Supp. 666 (D.N.J.).

superseded Pennsylvania's interest in determining contractual issue, where the toxic wastes allegedly came from insured's New Jersey plants); *see Armotek Industries v. Employers Insurance of Wausau,* 952 F.2d 756, 759 n. 4 (3d Cir.1991). Moreover, since this is a case, like *Leksi,* involving waste sites in just one state, the court need not address the issue of interpreting insurance contracts when the waste sites are located in several states. *See National Starch & Chemical Corp. v. Great American Insurance Cos.,* 743 F.Supp. 318 (D.N.J.1990).[4]

For the foregoing reasons, the court holds that the laws of New Jersey shall govern the policy interpretation issues in this case.

2) Cleanup Costs as Damages

[4] Chemical Leaman moves that this court find that the cleanup costs which it is obligated to pay pursuant to CERCLA with respect to ground and surface water contamination in the vicinity of its Bridgeport, New Jersey facility constitute "damages" on account of "property damage" within the meaning of the relevant insurance policies issued by defendants. The defendants contend that cleanup costs are not damages, but costs incident to complying with equitable and injunctive relief.

In *Broadwell Realty v. Fidelity & Casualty Company,* 218 N.J.Super. 516, 528 A.2d 76 (App.Div.1987), the court held that "costs of preventive measures taken by [the insured] on its own property in response to the [NJ]DEP directive which

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[4] It is true that the insurance policies can be interpreted in diverse if not contradictory ways if the law of the state where the waste is located always applies. However, as the *Johnson Matthey* court stated, there are "two opposing axes of possible uniformity ... [o]ne axis is uniform national interpretation of a single policy's language.... [t]he opposing axis is uniform interpretation that is site-specific." *Johnson Matthey* at 60-61, 593 A.2d 367. Moreover, nothing prevents the contracting parties to insurance contracts to provide a choice of law provision in the contracts. *Leksi* at 1336.

were designed to abate the continued flow of contaminants on the adjacent land are recoverable...." *Id.* at 525-526, 528 A.2d 76. Moreover, the *Broadwell* court stated:

> we are entirely satisfied that the [NJ]DEP's directive which threatened to assess [plaintiff] an amount equal to triple the costs of the prospective cleanup operation constituted a claim for damages within the meaning of the policy language. The insured's expenditures were made to discharge its legal obligation to the [NJ]DEP or, at the very least, to prevent what would have been an avoidable legal obligation to pay damages to a third party. The expenses were incurred by virtue of the *in terrorem* and coercive effect of the [NJ]DEP's directive. The harm to the State, by reason of the discharge of pollutants into its streams, and to others was continuing and ongoing. Further peril was both imminent and immediate. Under these circumstances, the abatement and response expenses constituted "damages" which [plaintiff] was legally obliged to pay.

Id. at 527-528; *accord CPS Chemical v. Continental Insurance,* 222 N.J.Super. 175, 536 A.2d 311 (App.Div.1988).

Similarly, in *Township of Gloucester v. Maryland Casualty Company,* 668 F.Supp. 394 (D.N.J.1987), this court held that cleanup costs do constitute "damages" on account of "property damage." *Id.* at 399-400 (cleanup costs for surrounding ground and surface waters); *accord Chesapeake Utilities Corp. v. American Home Assurance Co.,* 704 F.Supp. 551, 560-561 (D.Del.1989); *Centennial Insurance Co. v. Lumbermens Mutual Casualty Co.,* 677 F.Supp. 342, 349-350 (E.D.Pa.1987); *NJDEP v. Signo Trading International, Inc.,* 235 N.J.Super. 321, 331, 562 A.2d 251 (App.Div.1989); *see New Castle County v. Hartford Accident and Indemnity Co.,* 933 F.2d 1162, 1188-1190 (3d Cir.1991) (applying Delaware law); *Morrisville Water & Light Department v. United States Fidelity & Guaranty Co.,* 775 F.Supp. 718, 725-727 (D.Vt.1991); *Broadhead v. Hartford Casualty Insurance*

Company, 773 F.Supp. 882, 900-901 (S.D.Miss.1991). However, cleanup costs pertaining solely to damage to the insured's property and not to prevent off-site contamination is not within the coverage provided. *Broadwell* at 528-529, 528 A.2d 76; *accord CPS Chemical* at 187, 536 A.2d 311.

Thus, the court holds that Chemical Leaman's cleanup costs which it is obligated to pay pursuant to CERCLA with respect to ground and surface water contamination in the vicinity of but not at its Bridgeport, New Jersey facility constitute "damages" on account of "property damage" within the meaning of the relevant insurance policies issued by defendants.

3) Owned-Property Exclusion

[5] Chemical Leaman moves that this court find that the owned-property exclusion does not apply to remedial measures taken by Chemical Leaman that are designed to correct injury or to prevent further injury to the ground and surface waters of New Jersey. Chemical Leaman contends that despite the fact that its property may have been the source of the contamination, and some or all of the remedial measures may be conducted there, those measures are directed at correcting injury to third-party property, the contamination of the ground and surface water and neighboring private wells.

The "owned-property" exclusion does not apply to costs incurred as a result of injury to third-party property. *Gloucester Township* at 400; *NJDEP* at 330-336, 526 A.2d 251; *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co.*, 231 N.J.Super. 1, 11-12, 554 A.2d 1342 (App.Div.1989); *Summit Associates Inc. v. Liberty Mutual Fire Insurance Co.*, 229 N.J.Super. 56, 63-64, 550 A.2d 1235 (App.Div.1988); The *Diamond Shamrock* court held:

> the critical question ... was not whether the measures for which reimbursement was sought had been taken on the insured's own property or on property of a third party. The "owned property" exclusion does not purport to exclude claims because they are

> for sums expended for work performed within the premises owned by the insured. It excludes claims for sums which the insured is obligated to pay for "property damage to ... property owned ... by ... the insured." Claims arising out of injury to property of others for which the insured is responsible are covered by the terms of the policies even if the insured's damage are measured in part by the cost for remedial work which has to be performed on the insured's own property.

Diamond Shamrock at 12, 554 A.2d 1342; *accord Broadwell* at 528, 528 A.2d 76. If the contamination neither damaged nor threatened to damage the property of someone other than the insured, the insurer is not responsible for the cleanup costs. *Diamond Shamrock* at 13-14, 554 A.2d 1342; *Summit Associates* at 64, 550 A.2d 1235.

The EPA has already determined that the Site was the primary source of the groundwater contamination in the vicinity of the Bridgeport terminal facility and that other private wells are threatened with contamination. The court will therefore grant plaintiff's motion for summary judgment by holding that the owned-property exclusion does not apply to remedial measures taken by Chemical Leaman that are designed to correct injury or to prevent further injury to the ground and surface waters in the vicinity of its Bridgeport facility.

4) Insurance Policies in Effect on or After January 7, 1981

Defendants move that this court find that there is no insurance coverage for the environmental contamination at issue in this action under any insurance policy in effect on or after January 7, 1981. On or about January 7, 1981, as a result of a preliminary investigation, the NJDEP requested that Chemical Leaman undertake a hydrogeologic investigation to determine the extent and degree of groundwater contamination resulting

from its Bridgeport facility operations.[5] By letter dated May 18, 1982, Chemical Leaman assumed responsibility for the water quality deterioration.[6]

Defendants argue that since the relevant policies require that property damage be caused by an occurrence during the policy period that is neither expected nor intended from the standpoint of the insured, there is no insurance coverage as a matter of law upon Chemical Leaman's receipt of the NJDEP's letter of January 7, 1981 because of Chemical Leaman's actual knowledge of the contamination. Chemical Leaman contends that since the release of contaminants was continuing and ongoing well after 1981, summary judgment should not be granted because the defendants have not offered any evidence that Chemical Leaman was aware of the continuing nature of the occurrence prior to the 1985 Order.

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[5] The January 7, 1981 letter sent by the NJDEP to Chemical Leaman stated in relevant part:

> The results [of an investigation] indicated your on-site potable water supply well is heavily contaminated with organic chemicals.... [T]he Bureau of Potable Water took samples at several other locations in the vicinity of your facility. The results of these wells also show organic contamination.... The preliminary investigations of the Department indicate that the groundwater in the vicinity of Chemical Leaman is contaminated. In order to determine the extent and degree of contamination, it is requested that a hydrogeologic consultant be contacted to evaluate the contamination.

[6] Chemical Leaman's letter of May 18, 1982 to the NJDEP stated the following:

> As a result of the report prepared by the consulting firm of ERM Inc. entitled "Hydrogeologic Investigation of Groundwater Contamination at the Chemical Leaman Tank Lines Bridgeport Facility," dated September 8, 1981, Chemical Leaman assumes responsibility of water quality deterioration in the shallow and intermediate water bearing zones in the areas of the close settling impoundments, drum storage area and present settling tanks all within the confines of its property boundaries.

[6] For an "occurrence" policy, it is settled law that the insured is not entitled to coverage when it is aware of an occurrence prior to the policy period. *Gloucester Township* at 402-403; *see New Castle County* at 1191-1192 (applying Delaware law, no coverage if before the policy period, there is evidence indicating a substantial probability that a loss will occur). In cases in which the damage process is not a "definite, discrete event, the date of occurrence should be the continuous period from exposure to manifestation of damage." *Gottlieb v. Newark Insurance Company,* 238 N.J.Super. 531, 535, 570 A.2d 443 (App.Div.1990).

Genuine issues of material fact exist if it is unclear when all of the damage from the contaminants was capable of being known or predicted. *See Id.* at 537-538, 570 A.2d 443. In addition, genuine issues of material fact exist if it is unclear whether the insured engaged in continuous pollution of the ground and surface waters as a regular course of business after receiving notice of the contamination. *See American Mutual Liability Insurance Co. v. Neville Chemical Co.,* 650 F.Supp. 929, 933 (W.D.Pa.1987) (applying Pennsylvania law).

[7] The defendants have not convinced the court that the damage sustained by the date of the 1985 Order was capable of being known by Chemical Leaman or that Chemical Leaman continued to engage in continuous pollution of the ground and surface waters upon receipt of the January 7, 1981 NJDEP letter. In addition, defendants have not presented evidence demonstrating that Chemical Leaman either expected or intended to be responsible for CERCLA cleanup costs as of January, 1981. *Accord Liberty Mutual Insurance Co. v. Triangle Industries, Inc.,* 765 F.Supp. 881, 885 (N.D.W.Va.1991) (applying New Jersey law); *see also Morrisville Water* at 731. The court will deny defendants motion for summary judgment with respect to the policies in effect after January 7, 1981 because these factual issues still exist.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is granted and defendants' motions for summary judgment are denied.

DEFENDANTS' REVISED JOINT INSTRUCTION NO. 24

BURDEN OF PROOF-EXPECTATION AND INTENTION

There are three kinds of damage at issue in this case--soil contamination, groundwater contamination and swamp contamination. Each of the liability insurance policies from 1960 to 1981 requires proof that Chemical Leaman did not expect or intend contamination to the environment, meaning soils, groundwater or the swamp. Chemical Leaman has the burden to prove that it did not expect or intend such environmental damage for each policy year, that is, for each of the 21 years from 1960 to 1981.

In order for Chemical Leaman to prevail in a policy year, it bears the burden to prove by a preponderance of the evidence that it had no intention or expectation to cause injury or harm to the environment from its operations at the Bridgeport Terminal during that policy year. It is important for you, the jury, to remember that you must undertake an inquiry with respect to each policy year.

If you find that Chemical Leaman intended or expected some damage to the environment, that is, either the soil, or the groundwater, or the swamp, you may end your deliberation for that year, unless you conclude that the extent of the damage was improbable. You must then determine if Chemical Leaman expected or intended the actual damage that took place.

That is to say, if Chemical Leaman intended or expected damage to the soil, you must decide Chemical Leaman intended or expected damage to the environment that year, unless you find that damage to the groundwater and to the swamp was improbable. If you find such damage was not probable, then you must decide whether Chemical Leaman in fact intended or expected groundwater damage and swamp damage.

You must inquire into whether Chemical Leaman knew and understood that its discharge of pollutants into the unlined ponds and lagoons would result in damage to the environment. As part of this inquiry, you are not required to accept testimony by Chemical Leaman's current or former employees that there was no expectation or intention to cause damage to the environment. Rather, you must consider all the evidence which bears upon the question of Chemical Leaman's expectation and intention, including evidence affecting the credibility of the testimony of Chemical Leaman's former and current employees. Also, you should consider the facts which I have already deemed established including that Chemical Leaman was aware of the environmental hazards of the contaminants it placed into the rinsewater treatment system and that Chemical Leaman knew that the contaminants it placed into the unlined ponds and lagoons were seeping into the soil.

With respect to soil contamination, I have already found established that Chemical Leaman knew that environmentally hazardous contaminants in the rinsewater were seeping into the soil and that Chemical Leaman left the ponds and lagoons unlined precisely because one of the goals of the rinsewater treatment system was to utilize the soil in the cleaning process. The remaining factual issue for you, the jury, to decide is whether Chemical Leaman knew that permanent damage to the soils would result from its intentional releases of contaminants into the soils in the lagoons and ponds.

Authority: *SL Indus. v. American Motorists Ins. Co.*, 607 A.2d 1266, 1278-79 (N.J. 1992); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1191 (3d Cir.S 1991); *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, No. 89-1543, Opinion at 22 (D.N.J., March 10, 1993); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1334, 1376 (D.N.J. 1992); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132, 136 (E.D. Pa. 1986) ; *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1265 (N.J. 1992);

DEFENDANTS' REVISED JOINT INSTRUCTION NO. 27

INTENTION AND EXPECTATION DEFINED

The word "intended" means that Chemical Leaman desired the natural and probable consequences of its acts, or was indifferent to the known consequences of its acts.

"Expected" is not equivalent to "intended." The term "expected" means to look forward to the occurrence of something with little reservation as to its likelihood. The word "expected" comprehends a belief or knowledge by Chemical Leaman in the substantial certainty or probability of future consequences from its actions.

Authority: *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, No. 89-1543, Opinion at 22 (D.N.J., March 10, 1993); *SL Indus. v. American Motorists Ins. Co.*, 607 A.2d 1266, 1278-79 (N.J. 1992); *State of New Jersey v. Thomas*, 76 N.J. 344, 358, 387 A.2d 1187, 1193 (1978).

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF NEW JERSEY

DUPLICATE

CHEMICAL LEAMAN TANK LINES, INC.,	:	
Plaintiff,	:	Civil Action No. 89-1543 (SSB)
v.	:	
AETNA CASUALTY & SURETY CO., ROBIN ANTHONY GILDART JACKSON, an Underwriter at Lloyd's, London, *et al.*	:	
Defendants.	:	

JURY CHARGE

Found in Joint Appendix JA 14433-35

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identical to the one you are being asked to make above.

"CONTINUOUS AND INDIVISIBLE DAMAGE" -- DEFINED

Secondly, you must find whether the property damage caused at the Bridgeport site was part of a "continuous and indivisible" process. "Continuous" means connected, unbroken or uninterrupted. "Indivisible" means not capable of being separated into parts.

"EXPECTED OR INTENDED" -- DEFINED

Finally, Chemical Leaman may obtain basic coverage under defendants' insurance policies only if Chemical Leaman neither expected nor intended the property damage during the policy period at issue.

In deciding whether Chemical Leaman "intended" to cause property damage at the Bridgeport site, you must determine whether Chemical Leaman actually wanted to cause the property damage at the site. In deciding whether Chemical Leaman "expected" this property damage, you must determine whether Chemical Leaman knew with substantial certainty that it was causing the Bridgeport property damage.

A party's expectations or intentions may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer plaintiff's expectations or intentions from the surrounding circumstances. You may consider any statement made and done by plaintiff, and all other facts and circumstances in evidence which indicates its state of mind. As I have said, it is entirely up to you to decide what facts to find from the evidence.

"EXPECTED OR INTENDED" -- SUBJECTIVE STANDARD

Using these definitions, you, the jury, must decide whether, during each policy period in issue, Chemical Leaman subjectively expected or intended the property damage that is the subject matter of this litigation. In determining whether

Chemical Leaman expected or intended such property damage during each policy period, it is not sufficient for you to find that Chemical Leaman should have expected that damage would occur. Nor is it enough for you to find that other people or companies in similar circumstances might have expected the property damage to take place. Rather, you are instructed to determine whether Chemical Leaman actually and subjectively expected or intended to cause soil, groundwater, or wetlands property damage in each policy period. Even if you believe that Chemical Leaman's actions were foolhardy and reckless, Chemical Leaman is still entitled to coverage unless you find that Chemical Leaman actually intended or expected to cause the property damage at the Bridgeport site.

In making this determination, you must judge Chemical Leaman by what you find it subjectively knew and understood at the time. In other words, when you are asked to determine Chemical Leaman's subjective expectations or intentions in, for example, 1965, you should not judge it by today's standards. Nor should you judge Chemical Leaman by what it should have known in 1965. Rather, you must evaluate Chemical Leaman by what you find as a fact were its actual, subjective expectations or intentions with regard to causing groundwater, soil, or wetlands damage at the Bridgeport site.

Additionally, in making your determination as to Chemical Leaman's subjective expectation or intent, you should not be concerned about whether the Bridgeport rinsewater treatment system was the best system or the worst system available at the time of its operation. Instead, you must focus on Chemical Leaman's intentions and expectations -- that is, whether Chemical Leaman intended to cause property damage at the site or was substantially certain that such damage would result from its actions.

"EXPECTED OR INTENDED" -- FOCUS ON DAMAGE

In determining Chemical Leaman's expectations and intentions in the context of basic coverage, you are instructed to focus on whether the specific property damage was expected or intended. You are not to consider whether the acts which

caused that property damage were intentional acts. I give you this instruction because under New jersey law the unintended results of intentional acts may be covered by defendants' insurance policies. Thus, even though Chemical Leaman may have knowingly and intentionally committed the acts that ultimately led to the environmental damage at the Bridgeport site, there may still be insurance coverage, so long as you find that Chemical Leaman did not expect or intend the specific property damage that is the subject matter of this litigation, namely contamination of the soil, groundwater, or wetlands.

"EXPECTED OR INTENDED" -- SPECIFIC DAMAGE STANDARD

I further instruct you that, in deciding whether Chemical Leaman subjectively expected or intended to cause property damage, you must consider whether Chemical Leaman subjectively expected or intended the very damage that is the subject matter of this case. Thus, it is not sufficient for you to find that Chemical Leaman expected or intended any injury -- such as injury to the environment generally. Rather, you must determine whether Chemical Leaman expected or intended the actual property damage that it is now required to clean-up.

CORPORATE KNOWLEDGE

You, the jury, are being asked to determine the expectations and intentions of a corporation, the plaintiff Chemical Leaman. The expectation or intent of a corruption can only be measured by the knowledge and expectations of its corporate level management personnel. Therefore, in determining whether Chemical Leaman expected or intended to cause property damage, you must determine whether its corporate management -- that is, those persons responsible for formulating and implementing its waste treatment policies at the Bridgeport site -- "expected" or

NOS. 93-5777, 93-5794

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant,

ROBIN ANTHONY GILDART JACKSON, AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*,

Defendants-Appellants.

On Appeal From the United States
District Court of the
District of New Jersey

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QUESTIONS: FIRST, YOU MUST DETERMINE THAT PROPERTY DAMAGE OCCURRED DURING THE POLICY PERIOD WHICH CHEMICAL LEAMAN SEEKS TO RECOVER UNDER THE CONTINUOUS TRIGGER DOCTRINE. THIS FACTUAL DETERMINATION IS IDENTICAL TO THE ONE YOU'RE BEING ASKED TO MAKE ABOVE.

SECONDLY, YOU MUST FIND WHETHER THE PROPERTY DAMAGE CAUSED AT THE BRIDGEPORT SITE WAS PART OF A CONTINUOUS AND INDIVISIBLE PROCESS. CONTINUOUS MEANS CONNECTED, UNBROKEN OR UNINTERRUPTED. INDIVISIBLE MEANS NOT CAPABLE OF BEING SEPARATED INTO PARTS.

FINALLY CHEMICAL LEAMAN MAY OBTAIN BASIC COVERAGE UNDER DEFENDANTS' INSURANCE POLICIES ONLY IF CHEMICAL LEAMAN NEITHER EXPECTED NOR INTENDED THE PROPERTY DAMAGE DURING THE POLICY PERIOD OF AT ISSUE.

IN DECIDING WHETHER CHEMICAL LEAMAN INTENDED TO CAUSE PROPERTY DAMAGE AT THE BRIDGEPORT SITE, YOU MUST DETERMINE WHETHER CHEMICAL LEAMAN ACTUALLY WANTED TO CAUSE THE PROPERTY DAMAGE AT THE SITE. IN DECIDING WHETHER CHEMICAL LEAMAN EXPECTED THIS PROPERTY DAMAGE, YOU MUST DETERMINE WHETHER CHEMICAL LEAMAN KNEW WITH SUBSTANTIAL CERTAINTY THAT IT WAS CAUSING THE BRIDGEPORT PROPERTY DAMAGE.

A PARTY'S EXPECTATIONS OR INTENTIONS MAY NOT BE PROVED DIRECTLY BECAUSE THERE IS NO WAY OF FATHOMING OR SCRUTINIZING THE OPERATIONS OF THE HUMAN MIND. BUT YOU MAY INFER PLAINTIFF'S EXPECTATIONS OR INTENTIONS FROM THE SURROUNDING CIRCUMSTANCES. YOU MAY CONSIDER ANY STATEMENT MADE AND DONE

BY THE PLAINTIFF, AND ALL OTHER FACTS AND CIRCUMSTANCES IN EVIDENCE WHICH INDICATES ITS STATE OF MIND. AS I HAVE SAID, IT IS ENTIRELY UP TO YOU TO DECIDE FROM WHAT FACTS TO FIND FROM THE EVIDENCE.

USING THESE DEFINITIONS, YOU, THE JURY, MUST DECIDE WHETHER DURING EACH POLICY PERIOD IN ISSUE, CHEMICAL LEAMAN SUBJECTIVELY EXPECTED OR INTENDED THE PROPERTY DAMAGE THAT IS THE SUBJECT MATTER OF THIS LITIGATION. IN DETERMINING WHETHER CHEMICAL LEAMAN EXPECTED OR INTENDED SUCH PROPERTY DAMAGE DURING EACH POLICY PERIOD, IT IS NOT SUFFICIENT FOR YOU TO FIND THAT CHEMICAL LEAMAN SHOULD HAVE EXPECTED THAT DAMAGE WOULD OCCUR. NOR IS IT ENOUGH FOR YOU TO FIND THAT OTHER PEOPLE OR COMPANIES IN SIMILAR CIRCUMSTANCES MIGHT HAVE EXPECTED THE PROPERTY DAMAGE TO TAKE PLACE. RATHER, YOU ARE INSTRUCTED TO DETERMINE WHETHER CHEMICAL LEAMAN ACTUALLY AND SUBJECTIVELY EXPECTED OR INTENDED TO CAUSE SOIL, GROUNDWATER OR WETLANDS PROPERTY DAMAGE IN EACH POLICY PERIOD. EVEN IF YOU BELIEVE THAT CHEMICAL LEAMAN'S ACTIONS WERE FOOLHARDY AND RECKLESS, CHEMICAL LEAMAN IS STILL ENTITLED TO COVERAGE, UNLESS YOU FIND THAT CHEMICAL LEAMAN ACTUALLY INTENDED OR EXPECTED TO CAUSE THE PROPERTY DAMAGE AT THE BRIDGEPORT SITE.

IN MAKING THIS DETERMINATION, YOU MUST JUDGE CHEMICAL LEAMAN BY WHAT YOU FIND IT SUBJECTIVELY KNEW AND UNDERSTOOD AT THE TIME. IN OTHER WORDS, WHEN YOU'RE ASKED TO DETERMINE CHEMICAL LEAMAN'S SUBJECTIVE EXPECTATIONS OR INTENTIONS IN, FOR EXAMPLE, 1965, YOU SHOULD NOT JUDGE IT BY TODAY'S STANDARDS. NOR SHOULD YOU JUDGE CHEMICAL

LEAMAN BY WHAT IT SHOULD HAVE KNOWN AND IN 1965. RATHER, YOU MUST EVALUATE CHEMICAL LEAMAN BY WHAT YOU FIND AS A FACT WERE ITS ACTUAL SUBJECTIVE EXPECTATIONS OR INTENTIONS WITH REGARD TO CAUSING GROUNDWATER, SOIL OR WETLANDS DAMAGE AT THE BRIDGEPORT SITE.

ADDITIONALLY, IN MAKING YOUR DETERMINATION AS TO CHEMICAL LEAMAN'S SUBJECTIVE EXPECTATION OR INTENT, YOU SHOULD NOT BE CONCERNED ABOUT WHETHER THE BIRDGEPORT RINSEWATER TREATMENT SYSTEM WAS THE BEST SYSTEM OR THE WORSE SYSTEM AVAILABLE AT THE TIME OF ITS OPERATION. INSTEAD, YOU MUST FOCUS ON CHEMICAL LEAMAN'S INTENTIONS AND EXPECTATIONS, THAT IS WHETHER CHEMICAL LEAMAN INTENDED TO CAUSE PROPERTY DAMAGE AT THE SITE OR WAS SUBSTANTIALLY CERTAIN THAT SUCH DAMAGE WOULD RESULT FROM ITS ACTIONS.

IN DETERMINING CHEMICAL LEAMAN'S EXPECTATIONS AND INTENTIONS IN THE CONTEXT OF BASIC COVERAGE, YOU'RE INSTRUCTED TO FOCUS ON WHETHER THE SPECIFIC PROPERTY DAMAGE WAS EXPECTED OR INTENDED. YOU ARE NOT TO CONSIDER WHETHER THE ACTS WHICH CAUSED THAT PROPERTY DAMAGE WERE INTENTIONAL ACTS. I GIVE YOU THIS INSTRUCTION BECAUSE UNDER NEW JERSEY LAW THE UNINTENDED RESULTS OF INTENTIONAL ACTS MAY BE COVERED BY DEFENDANTS' INSURANCE POLICIES. THUS, EVEN THOUGH CHEMICAL LEAMAN MAY HAVE KNOWINGLY AND INTENTIONALLY COMMITTED THE ACTS THAT ULTIMATELY LED TO THE ENVIRONMENTAL DAMAGE AT THE BRIDGEPORT SITE, THERE MAY STILL BE INSURANCE COVERAGE, SO LONG AS YOU FIND THAT CHEMICAL LEAMAN DID NOT EXPECT OR INTEND THE SPECIFIC PROPERTY

DAMAGE THAT IS THE SUBJECT MATTER OF THIS LITIGATION. NAMELY, CONTAMINATION OF THE SOIL, GROUND WATER OR WETLANDS.

I FURTHER INSTRUCT YOU THAT IN DECIDING WHETHER CHEMICAL LEAMAN SUBJECTIVELY EXPECTED OR INTENDED TO CAUSE PROPERTY DAMAGE, YOU MUST CONSIDER WHETHER CHEMICAL LEAMAN SUBJECTIVELY EXPECTED OR INTENDED THE VERY DAMAGE THAT IS THE SUBJECT MATTER OF THIS CASE. THUS, IT IS NOT SUFFICIENT FOR YOU TO FIND THAT CHEMICAL LEAMAN EXPECTED OR INTENDED ANY INJURY, SUCH AS INJURY TO THE ENVIRONMENT GENERALLY. RATHER YOU MUST DETERMINE WHETHER CHEMICAL LEAMAN EXPECTED OR INTENDED THE ACTUAL PROPERTY DAMAGE THAT IT IS NOW REQUIRED TO CLEAN UP.

YOU, THE JURY, ARE BEING ASKED TO DETERMINE THE EXPECTATION AND THE INTENTIONS OF A CORPORATION, THE PLAINTIFF, CHEMICAL LEAMAN THE EXPECTATIONS AND INTENTIONS OF A CORPORATION CAN ONLY BE MEASURED BY THE KNOWLEDGE AND EXPECTATIONS OF ITS CORPORATE LEVEL MANAGEMENT PERSONNEL. THEREFORE, IN DETERMINING WHETHER CHEMICAL LEAMAN EXPECTED OR INTENDED TO CAUSE PROPERTY DAMAGE, YOU MUST DETERMINE WHETHER ITS CORPORATE MANAGE, THAT IS THOSE PERSONS RESPONSIBLE FOR FORMULATING AND IMPLEMENTING ITS WASTE TREATMENT POLICIES AT THE BRIDGEPORT SITE, EXPECTED OR INTENDED TO CAUSE THE PROPERTY DAMAGE AT THE SITE. IT IS IRRELEVANT TO YOUR DETERMINATION IF DRIVERS OR TANK CLEANERS AT THE BRIDGEPORT TERMINAL WHO ACTED CONTRARY TO CORPORATE POLICIES AND PROCEDURES EXPECTED OR INTENDED PROPERTY DAMAGE. INSTEAD, YOU MUST ASSESS WHETHER CHEMICAL LEAMAN'S CORPORATE MANAGEMENT LEVEL OR

THOSE EMPLOYEES WITH FUNCTIONAL RESPONSIBILITY OVER WASTE TREATMENT PROCEDURES AT THE BRIDGEPORT SITE HAD SUCH AN INTENTION OR EXPECTATION.

THE SECOND CATEGORY ARE FACTUAL ISSUES THAT YOU, THE JURY, MUST DETERMINE CONCERN CERTAIN EXCLUSIONS FROM COVERAGE. AN EXCLUSION IS A PROVISION IN DEFENDANTS' INSURANCE POLICIES THAT EXCLUDES INSURANCE COVERAGE FOR CERTAIN TYPES OF DAMAGES THAT WOULD OTHERWISE FALL WITHIN THE POLICIES BASIC GRANT OF COVERAGE. THE DEFENDANTS ASSERT THAT THE POLLUTION EXCLUSION PRECLUDES ANY RESPONSIBILITY ON THEIR PART FOR COVERAGE OF THE COSTS OF CLEANING UP GROUND WATER AND WETLANDS CONTAMINATION.

I HAVE ALREADY EXPLAINED TO YOU THAT NEW JERSEY LAW PLACES THE BURDEN OF PROOF ON CHEMICAL LEAMAN TO PROVE ALL OF THE FACTS NECESSARY FOR BASIC COVERAGE UNDER DEFENDANTS' INSURANCE POLICIES. YOU ARE NOW BEING ASKED TO DETERMINE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5777

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

ROBIN ANTHONY GILDART JACKSON, AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*,

Defendants-Appellants.

PETITION OF DEFENDANTS-APPELLANTS ROBIN ANTHONY GILDART JACKSON, AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL*, FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Dated: July 5, 1996

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I. The Court's Fundamental Errors In Failing To Follow Authoritative State Precedent In A Diversity Case And The Established Standard Of Appellate Review Present Issues Of Exceptional Importance.

Appellants Robin Anthony Gildart Jackson, An Underwriter at Lloyd's, London and Certain London Market Insurance Companies ("LMI") respectfully petition the Court for rehearing of their appeal and suggest that it be reheard *en banc*. While LMI acknowledge that this Court does not ordinarily review *en banc* questions pertaining solely to the interpretation of state law, Third Circuit Internal Operating Procedure 9.3.3., the legal issues presented herein are of exceptional importance to insurers covering risks in the State of New Jersey and elsewhere and to the policyholders with whom they have contracted. More importantly, the issues on which LMI seek rehearing on turn upon core concepts of contractual law, standards of judicial review, and fundamental constitutional rights including procedural due process.

The panel's vacillating position signifies that the issues presented in this appeal demand reexamination. Between October 1995, when the Court's original opinion was issued, and June 1996, when a reconstituted majority handed down the opinion (Attachment "1") which is the subject of the instant petition, the New Jersey Supreme Court made no major pronouncements interpreting or modifying the seminal New Jersey case governing environmental insurance cases, *Morton Int'l, Inc. v. General Acc. Ins. Co.*, 629 A.2d 831 (N.J. 1993) *("Morton"), cert. denied*, 114 S.Ct. 2764 (1994). Yet, in the intervening months the deciding panel reversed itself, eviscerated the binding New Jersey rule requiring the application of an objective test" in determining an insured's intention or expectation to pollute, and usurped the function of the jury as primary fact-finder on multiple issues of material fact. Slip op. at 20, 22-24. In affirming the judgment below, the Court departs from long established precedent governing the standard of appellate review of grants of summary judgment and judgments as a matter of law, which remove factual issues

from jury fact-finding. Rehearing is required to revisit whether such a radical departure was intended by the Court, which will confuse parties and counsel practicing before the Court.

Further, rather than adhering to recent authoritative state precedent, the Court's opinion predicts that the New Jersey Supreme Court would modify the 1992 decision of *SL Industries Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266 (N.J. 1992), which, if fully implemented, would admittedly bar insurance coverage in this case. The Court lacks free rein to recast binding state precedent to save insurance coverage for an insured who admittedly notified the insurers of the underlying pollution claim four years after entering to a remedial consent decree. Slip op. at 36. Moreover, this Court blithely imposed regulatory estoppel upon insurers who were not afforded the opportunity to make an evidentiary showing in their defense, thereby depriving LMI of their procedural due process rights.

This reversal, we fear, was prompted more by Chemical Leaman Tank Lines, Inc.'s ("CLTU) and *amicus curie* State of New Jersey's false protestations that the Court's original opinion of October 1995 would leave hundreds of polluted sites in New Jersey unremediated. As the federal district court itself admonished the jury at trial, CLTL's polluted site will be cleaned up regardless of the outcome of this case. Joint Appendix ("JA") 11639. Meanwhile, the effect of the majority panel's misapprehension of binding New Jersey precedent will "give polluters comfort and allow them to discharge pollutants in relative safety," Slip op. at 61 (McKee, J., dissenting in part), because the Court will have deprived insurers of their objectively reasonable contractual expectations of not reimbursing wrongdoers for non-fortuitous harm.

II. The Court Improvidently Removed From Jury Consideration The "Exceptional Circumstances" Test Which Is The Rule In New Jersey Environmental Coverage Cases.

A. Exceptional Circumstances Test As Rule Not Exception.

As comprehensively analyzed in Judge McKee's dissenting opinion, the evidentiary playing field in environmental insurance cases was altered by *Morton*. The New Jersey Supreme Court in Morton surveyed the prior New Jersey case law on the "expected or intended" issue in insurance coverage cases generally, including *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255 (N.J. 1992), and *SL Industries. Morton* then engrafted an *alternative* "exceptional circumstances" approach to be applied in environmental insurance disputes to objectively establish an insured's expectation or intention as a complement to the "impractical" subjective approach pronounced in *Voorhees* and *SL Industries*. In this diversity case, the Court is bound to follow *Morton* even though it was decided after the trial below. *Air Prods. & Chem. Inc. v. Hartford Acc. & Indem. Co.*, 25 F.3d 177, 181 (3d Cir. 1994). The Court's categorization of *Morton*'s "exceptional circumstances" test as an "exception," rather than the rule in environmental coverage disputes, slip op. at 22-23, ignores the plain import of the decision. Recognizing the unavailability of "smoking gun testimony" demonstrating a polluter's subjective intent in environmental coverage cases, *Morton* devised the exceptional-circumstances test. It defies logic to conclude that the New Jersey Supreme Court would go to such great lengths to devise the exceptional-circumstances test to then undermine its utility. Slip op. at 22. Moreover, the majority's opinion confining the exceptional-circumstances test to situations only where egregious conduct is evident is counterintuitive. Slip op. at 22. A reading of *Morton* makes it obvious that egregious conduct is determined by application of the exceptional-circumstances test.

B. Incorrect Standard of Appellate Review Was Applied.

The Court applied the wrong standard of review in affirming the district court's determination to withhold from the jury the question of whether "exceptional circumstances" existed. In its opinion granting partial summary judgment and in denying LMI's motion for judgment under Rule 50(a) of the Federal Rules of Civil Procedure ("FRCP") that the trial evidence of "exceptional circumstances" had been sufficiently established to warrant judgment for LMI the district court decided as a matter of law that "exceptional circumstances" did not exist and withheld the issue from jury consideration. *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, 817 F. Supp. 1136, 1146 (D.N.J. 1993); JA 10996-11000, 11386-98, 11409, 14478-79. In sustaining the lower court's erroneous decision, the Court commented, "We believe a reasonable jury *could* find Chemical Leaman did not engage in a 'pattern of stonewalling.' On the contrary, jury *could* conclude that Chemical Leaman's behavior suggests a good faith effort at compliance with agency demands." Slip op. at 24. (emphasis added).

The standard of appellate review invoked here is fundamentally at odds with established precedent. Before an issue may be removed from the jury's consideration, the district court is required to review all the trial evidence, including all inferences which could reasonably be drawn therefrom, in the light most favorable to the non-movant (LMI), and determine whether a reasonable jury could *only* find against that party (LMI). *Link v. Mercedes-Benz of North America Inc.*, 788 F.2d 918, 921 (3rd Cir. 1986); *Patzig v. O'Neil*, 577 F.2d 842, 846, 848-49 (3rd Cir. 1978). In other words, "a judge must be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well as a contrary finding, but additionally that there is insufficient evidence for permitting any different finding." *Mihalchak v. American Dredging Co.*, 266 F.2d 875, 877 (3d Cir. 1959), *cert. denied*, 361 U.S. 901 (1959); *accord In re Phillips Petroleum Litigation*, 881 F.2d 1236, 1243 (3d Cir. 1989).

Conspicuously absent from the majority's opinion is a determination that, when viewing the evidence in a light most favorable to LMI, a reasonable jury could *not* have found that CLTL's polluting activities constituted "exceptional circumstances." The trial evidence as recounted in Judge McKee's dissent, slip op. at 40, 57-60, compels the conclusion that a jury could find "exceptional circumstances" existed from the legally sufficient record evidence. This alone warrants a retrial to determine whether "exceptional circumstances" objectively establish Chemical Leaman's expectation or intention to injure. *Inventive Music Ltd. v. Cohen*, 617 F.2d 29 (3d Cir. 1980). Unless this case represents a seminal departure from established precedent, rehearing is necessary to remedy an egregious error.

III. Where "Exceptional Circumstances" Are Not Present, *Morton* Did Not Diminish The Full Application of *SL Industries*.

The Court is bound to follow holdings of the New Jersey Supreme Court in this diversity case, unless there are clear and persuasive indications that its rulings will be modified, limited or restricted. *West v. American Tel. & Tel.* Co., 311 U.S. 223, 236 (1940); *Micromanolis v. Woods School, Inc.*, 989 F.2d 696, 701 (3d Cir. 1993). In upholding an erroneous jury instruction on the "expected or intended" standard, the Court abandoned its federalist covenant by reinterpreting authoritative precedent of the New Jersey Supreme Court. The Court simply reanalyzed state law to fashion a more preferable rule.

In proffering its jury instruction on the issue of expectation and intention, LMI paralleled the language set forth in *SL Industries*, to wit, "Assuming the wrongdoer subjectively intends or expects some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury." *SL Industries*, 607 A.2d at 1278; JA 14403. Over LMI's objection, the district court's jury charge omitted

the two essential elements of the *SL Industries* test: (1) the language barring coverage when the insured expects or intends "some sort of injury," and (2) whether the "extent of the injuries was improbable." Slip op. at 17-18; JA 11601, 11604, 11607-08.

In its FRCP 56(d) Order at ¶21, the district court concluded as a matter of law that CLTL had intentionally discharged known pollutants into the soil. JA 8728. The lower court's finding and the trial testimony of CLTL's key witness, Harry Elston, who admitted knowingly causing wetlands damage, JA 9993-94, 10038-39, coupled with the "some sort of injury" holding of *SL Industries* should preclude coverage under any LMI policy. However, the Court avoided this logical result by predicting that the New Jersey high court would "reject a wooden application *of SL Industries.*" Slip op. at 19, 20. The refusal to follow *SL Industries* offends established case law of the United States Supreme Court and this Circuit.

This Court, in rejecting LMI's argument, explains that *Morton* rejected a "general rule" of precluding coverage based on a "knowing discharge of pollutants." Slip op. at 19. LMI agrees that *Morton* would not deny insurance coverage when an insured simply "knowingly" discharged pollutants. The Court's comment, however, fails to address the fact that CLTL *knowingly* discharged *known* pollutants, which CLTL's key trial witness testified caused known wetlands damage, which is precisely LMI's argument below and on appeal why CLTL intended or expected "some sort of injury" and is barred from coverage under *SL Industries* and *Morton*.

Contrary to *Morton*, the Court exaggerates the "relevance" of the "insured's appreciation of the magnitude and nature of harm" in order to diminish the significance of *SL Industries'* "some sort of injury" language. Slip op. at 20. In *Morton*, the New Jersey Supreme Court appreciated that undue weight would be accorded to an insured's knowledge of the "magnitude" of the environmental damage. The *Morton* court admonished that "we do not consider that differences in harm relating to the severity of environmental damage give rise to a

finding of "improbability" of harm that invokes the need for evidence of subjective intent." *Morton*, 629 A.2d at 882. CLTL's failure to anticipate that discharges of contaminated rinsewater at the Bridgeport Terminal for more than 20 years would cause environmental harm of the severity extant there "hardly demonstrates that the extent of the injury was 'improbable'." *Id.*

The Court relies upon public policy goals articulated in *SL Industries* to reject the application of the "some sort of injury" language to environmental coverage disputes. Slip op. at 20-21. The teaching of *SL Industries* is antithetical to the Court's suggestion that the New Jersey Supreme Court would prefer the specific-damage approach to the "expected or intended" analysis. In its effort to reconcile the competing public policy goals of interpreting insurance policy provisions in light of an insured's objectively reasonable expectations, deterring intentional wrongdoing, and compensating victims, *SL Industries* expressly refused to adopt the specific-damage approach, which the Court now advocates: "[A]n approach allowing coverage whenever the adverse consequences intended by the tortfeasor did not precisely match the actual consequences of their wrongful actions undermines the basic policy against indemnifying wrongdoers." *SL Industries*, 607 A.2d at 1278. *SL Industries*, instead, held that the "most reasonable approach," which balances the competing public policy goals, precludes insurance coverage generally if "the wrongdoer subjectively intends or expects to cause some sort of injury"; however, "if there is evidence that the extent of the injuries was improbable, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury." *Id.* Furthermore, the New Jersey Supreme Court most recently in *General Acc. Ins. Co. v. State Dept. of Environ. Prot.*, 672 A.2d 1154, 1161 (N.J. 1996), downgraded the importance of the insured's reasonable expectations "in the context of commercial CGL coverage" disputes. It is respectfully submitted that the jury charge did not fairly and adequately present SL *Industries'* subjective approach. Rehearing is necessary to correct this fundamental error.

Without support from the present trial record, this Court justifies modifying the *SL Industries* test upon a finding of "historical fact" that insureds generally are unaware that groundwater damage results from the disposal of liquid industrial wastes into unlined waste ponds. Slip op. at 20.[1] This appellate fact-finding ignores the actual evidentiary and procedural record made below. Prior to trial, CLTL moved *in limine* to preclude LMI from proffering evidence of CLTL's actual knowledge of groundwater contamination from the disposal of liquid wastes at other locations, which the district court granted. At trial, fearful of "opening the door" to the insurers, CLTL did not proffer "state of the art" evidence which is, by definition, other-site evidence, albeit relating to other insureds. Such evidence, while probative, is not as valuable as evidence showing what the same insured actually knew from its polluting conduct at other locations. At trial, LMI proffered such other-site evidence regarding CLTL's actual knowledge, which the district court deemed inadmissible. Also, implicit in this Court's finding of a "historical fact" is its apparent need to review what it deems "historical fact," i.e., "state of the art" evidence. The Court has, *sua sponte* on appeal, considered the very type of evidence which LMI was precluded from introducing at trial. Quixotically, this finding supports LMI's position that the district court erred in denying the admission of other-site evidence. It is fundamentally unfair to uphold the district court's exclusion of such other-site evidence, slip op. at 32-34, while at the

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[1] The Court's notice of "historical fact" is contrary to New Jersey history. In *P. Ballantine v. Public Serv. Corp. of New Jersey*, 70 A. 167 (N.J. 1908) (a private nuisance judgment upheld for industrial coal gas tar wastes percolating through the soil and contaminating the groundwater supply of the neighboring brewery); *P. Ballantine v. Public Serv. Com. of New Jersey*, 91 A. 95 (N.J. 1914); *accord Kinnaird v. Standard Oil* Co., 12 S.W. 937 (Ky Ct. App. 1890); *see Sterling v. Velsicol Chemical Corp.*, 647 F. Supp. 303, 388 (W.D. Tenn. 1986) ("By the 1950s, there was a great deal of information that had been amassed about the potential for groundwater contamination and actual groundwater contamination resulting from waste disposal practices, both sanitary and industrial."), *aff'd in part & rev'd in part*, 855 F.2d 1188 (6th Cir. 1988).

same time, relying upon other-site evidence to predicate its holding. Further, this unfair use of other-site evidence defensively to sustain insurance coverage cannot be reconciled with the Court's upholding of the *in limine* exclusion of other-site evidence under Morton's "exceptional circumstances" test.

Another fundamental error lies in the Court's inversion of *SL Industries'* subjective approach. The Court has seemingly changed the *SL Industries* test to avoid addressing LMI's assignment of error to the district court's handling of the "improbability" issue posed in *SL Industries*. The opinion at 21 recites:

> Rather, we believe the New Jersey Supreme Court would inquire into the insured's intent or expectation to cause environmental harm of a particular sort, for example, whether the insured intended damage to the soil, groundwater, or wetlands. Where the insured intends or expects such harm, coverage is precluded, unless, of course, the injury is improbable.

The opinion at 22 repeats this re-configuration of *SL Industries*. In stark contrast, *SL Industries* states that "[i]f there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury." 607 A.2d at 1278. The probability of the extent of the damage is clearly a threshold requirement to whether the fact-finder needs to evaluate the insured's subjective expectation or intention to cause the actual damage sustained. The district court understood as much, which prompted the ruling in response to LMI's FRCP 50(a) and (b) motions that the extent of the damage was improbable. JA 14481. That ruling validated the final jury instruction which focused on whether CLTL subjectively expected or intended the specific environmental damage at the Bridgeport Terminal. JA 14456, 14459, 14473, 14480-81.

Like the district court's improvident removal of the "exceptional circumstances" test from jury fact-finding, the

lower court also removed from the jury's consideration the factual issue under *SL Industries* of whether the extent of the damage was improbable. At trial, there was material record evidence of the probability of the environmental damage from CLTL's waste disposal activity. JA 10809, 11217-19. In response to LMI's FRCP 50(a) motion, the district court concluded that there was "sufficient evidence" of improbability, which, according to established precedent, should have sent the probability issue to the jury for fact-finding. JA 14481. The district court, however, refused to charge the jury on the probability issue, thereby removing the matter from the jury. Rehearing is necessary to correct this egregious mistake.

IV. The Application Of Regulatory Estoppel Without An Evidentiary Hearing Denies LMI Procedural Due Process Required By The Fifth Amendment.

This Court has addressed the issue of regulatory estoppel for the first time on appeal. While the argument of regulatory estoppel was available to CLTL below, it avoided pursing the issue at trial. *Chemical Leaman,* 817 F. Supp. at 1156 n. 16. The issue of regulatory estoppel became dispositive of the pollution exclusion for the first time on appeal. Despite this factual deficit, this Court has improperly addressed the regulatory estoppel argument in the face of a non-existent factual record. *See Lee v. Celotex Corp.*, 764 F.2d 1489, 1492-93 (11th Cir. 1985); *Newark Morning Ledger Co. v. U.S.*, 539 F.2d 929, 932-933 (3d Cir. 1976). The Court's application of *Morton*'s unique brand of regulatory estoppel which reforms LMI's pollution exclusion without an evidentiary hearing is an unconstitutional deprivation of LMI's procedural due process. Slip op. at 28-29; *see Syndergeneral Corp. v. Great Am. Ins. Co.*, No. 3-90-CV-2396-BD, 1996 WL 309402 at *7 (N.D. Tex. April 25, 1996) (New Jersey is the only state to endorse regulatory estoppel.).

The Due Process Clause of the Fifth Amendment requires an evidentiary hearing before LMI can be finally deprived of procedural due process. *Matthews v. Eldridge*, 424 U.S. 319,

332-33 (1976). The insurers were not afforded an opportunity of an evidentiary hearing neither in the instant case nor in *Morton*. *Morton*, 629 A.2d at 848. At a minimum, the trier of fact in this case, would have to have found by clear and convincing evidence that: (1) LMI, or an "industry trade group" of which LMI was a member, submitted misleading filings before New Jersey insurance regulators on the pollution exclusion; (2) CLTL was unaware of the purported limitation in coverage; (3) LMI desired CLTL to rely upon the misrepresentation; (4) CLTL reasonably relied upon the purported misrepresentations; and (5) CLTL suffered a detriment as a result. *See, e.g., Horsemen's Benevolent & Protective Ass'n.* 487 A.2d 707, 712-13 (N.J. 1985); *Miller v.* Miller, 478 A.2d 351, 355 (N.J. 1984). In addition, this trier of fact would have to make predicate findings that the LMI policies at issue were subject to New Jersey insurance regulation and that the regulators were in fact deceived.

It is fundamentally unfair for the majority to engage in appellate fact-finding *de novo*. In doing so, the majority relies upon fragmentary and unverified factual assertions which remain unchallenged through cross-examination at a duly constituted evidentiary hearing. The reformation of LMI's unambiguous language, unconstitutionally deprived LMI of their contractual property rights. The deprivation here was perhaps even more egregious. The result in *Morton* was brought about by an allegedly deceptive explanation of the standard or ISO pollution exclusion. That explanation is the only reason which *Morton* cites to disregard the plain policy language. LMI did not submit, and was not required to submit, any explanation of London Market pollution exclusion (NMA 1685) to the New Jersey regulators.

If CLTL had pursued its regulatory estoppel claim at trial, a fully developed factual record would have been available for appellate review. Since CLTL failed to make the argument below, the Court should not have considered the regulatory estoppel issue on appeal. Having done so, however, the majority has bestowed a windfall benefit to CLTL.

V. LMI Adequately Preserved As Error The District Court's Jury Charge On The Pollution Exclusion.

LMI properly preserved for appeal the district court's incorrect jury charge, requesting separate findings with regard to CLTL's intent to discharge into the groundwater and wetlands at the Bridgeport site. In adopting Aetna's counsel's objection to the district court's instruction on the pollution exclusion, quoted in slip op. at 30, LMI met the requirements of FRCP 51. While counsel's objection to the instruction may have been somewhat difficult for the Court to understand, it satisfied the threshold test for assigning error to a jury charge, and it did fairly and timely apprise the district court of the objection.

FRCP 51 does not require strict formality in the manner in which the party objects to an alleged error in a jury charge. *Sowizral v. Hughes*, 333 F.2d 829, 836 (3d Cir. 1964). The objection was timely and adequate to preserve LMI's assignment of error. It is clear that the district court understood LMI's exceptions to the pollution exclusion charge, commenting: "The Court feels we've gone over these things enough already. And I see no reason to change my position." JA 11612. The legal grounds of the objection were set forth, however ungrammatically, when counsel objected: "It is not required that there be an intent or an expectation to discharge a particular medium, rather it's the discharge itself and where it goes. This should not be the subject of the deliberation of the jury." Objections made in an almost identical manner, albeit in a grammatically correct fashion, have been held adequate under FRCP 51. *See eg., Taylor v. Denver & Rio Grande Western RR. Co.*, 438 F.2d 351 (10th Cir. 1971). Neither the text nor spirit of FRCP 51, nor the Advisory Committee's Notes to FRCP 51 require, as the Court seems now to impose, slip op. at 32, the objecting party to cite authority upon which the objection is based. To preclude review of the district court's error and to ignore the merits of LMI's argument relating to CLTL's intent to discharge and the resulting application of the pollution exclusion as the

result of an ungrammatical objection would be the ultimate exultation of form over substance. *Miller v. AVEMCO Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979).

CONCLUSION

For all the reasons stated herein, rehearing or rehearing *en banc* should be granted.

Dated: July 5, 1996

Respectfully submitted,

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REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance, *i.e.*, whether recent authoritative New Jersey precedent in *Morton Int'l, Inc. v. General Acc. Ins. Co.*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S.Ct. 2764 (1994), requires the application of its objective "exceptional circumstances" test in all New Jersey environmental insurance coverage cases, whether binding New Jersey precedent in *SL Industries Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266 (N.J. 1992), may be re-interpreted to remove essential elements of the subjective "expected or intended injury" standard for insurance coverage, whether established standards of judicial review were followed in removing material factual issues from jury consideration, and whether foreign insurers should be held bound by the New Jersey doctrine of regulatory estoppel without an evidentiary hearing in deprivation of rights under the Due Process Clause of the Fifth Amendment.

Dated: July 5, 1996

Respectfully submitted,

/s/ Henry Lee

Henry Lee

Counsel for Appellants Robin Anthony Gildart Jackson, an Underwriter at Lloyd's, London *et al.*

CERTIFICATE OF SERVICE

L Steven Schiavello, hereby certify that I have served the foregoing Petition of Defendants-Appellants Robin Anthony Gildart Jackson, An Underwriter at Lloyd's, London, *et al.* for Rehearing and Suggestion for Rehearing *En Banc*, via courier on July 5, 1996, upon:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NOS. 93-5777; 93-5794

CHEMICAL LEAMAN TANK LINES, INC. Plaintiff-Appellee, v. THE AETNA CASUALTY AND SURETY COMPANY, *et al.* THE AETNA CASUALTY AND SURETY COMPANY, Defendant-Appellant in No. 93-5794 and ROBIN ANTHONY GILDART JACKSON, An Underwriter at Lloyds, London, *et al.*, Defendants-Appellants in No. 93-5777.	)	On Appeal from the Final Judgment of the United States District Court for the District of New Jersey Sat Below: The Honorable Stanley S. Brotman

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BRIEF ON BEHALF OF *AMICUS* STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, IN SUPPORT OF PETITION FOR REHEARING

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STATEMENT OF INTEREST OF AMICUS

The Third Circuit has incorrectly construed the standard for intent in environmental insurance coverage cases as established by the New Jersey Supreme Court in *Morton International, Inc. v. General Accident*, 134 *N.J.* 1, 629 *A.*2d 831 (1993), *cert.* denied, ____ *U.S.* ___, 114 *S.Ct.* 2764, 129 *L.Ed.*2d 878 (1994). The Third Circuit has held that the issue under occurrence coverage in the standard comprehensive liability policy is whether the insured "should have known" that the environmental damage would occur, applying an objective, reasonable person test based on its interpretation of *Morton*. To the contrary, the New Jersey Supreme Court simply added an objective element to the inquiry into the particular insured's intent. The policy language has not been construed in *Morton* and other New Jersey precedent to permit an objective intent standard incorporating negligence principles. The Third Circuit opinion could have the effect of eliminating coverage that would otherwise be available under *Morton*.

Amicus State of New Jersey, Department of Environmental Protection (New Jersey), is responsible for the conservation of natural resources, the promotion of environmental protection, and the remediation of past discharges of hazardous substances onto its lands and into its waters. *N.J.S.A.* 13: ID-9; *N.J.S.A.* 58:10-23.11f. Environmental contamination is a serious problem in New Jersey. Decades of industrial discharges, for the most part unregulated until the 1970's, have left a legacy of polluted ground water, soil, and surface waters. The dischargers were businesses that typically carried insurance under standard comprehensive general liability policies with the same or similar language as the occurrence language construed under The participation of insurers who have a contractual obligation to indemnify their insureds is a key component to achieving the cleanup and removal of discharges of hazardous substances throughout the state.

Appellee Chemical Leaman Tank Lines, Inc. (Chemical Leaman) has filed a petition for rehearing on the interpretation of *Morton*, and New Jersey submits this brief in support of the petition for rehearing because of the need to correct the application of the *Morton* exceptional circumstances test in this opinion. The Third Circuit's opinion could adversely affect pending state and federal cases and could also inform coverage decisions by carriers that do not reach litigation, and decisions in other states. New Jersey agrees with Chemical Leaman that the issue on rehearing is one of exceptional importance.

BRIEF STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

Between 1960 and 1985, Chemical Leaman used its facility in Bridgeport, New Jersey, to clean tank trucks that had been used to transport chemicals and other liquids. The rinse water from the tank cleaning operation drained into a wastewater treatment system consisting of unlined ponds and lagoons until 1975, when the company installed a water treatment system. By 1977, Chemical Leaman had drained the ponds and lagoons, dredged the accumulated sludge out of the

lagoons, and filled the ponds and lagoons with brickbat, sand, and concrete. *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.. et al.*, 817 *F.Supp.* 1136, 1140 (D.N.J.1993).

An investigation ordered by New Jersey revealed that the ponds and lagoons were the source of contamination of ground water at and around the Bridgeport site. 817 *F.Supp.* at 1140. Chemical Leaman has incurred expenses in performing the investigation, and is obligated to remediate the site or to pay for the costs of any remedial action by the United States or the State of New Jersey, as well as damages for injury to natural resources. *Id.*

Chemical Leaman purchased primary comprehensive general liability insurance from Aetna Casualty and Surety Company for successive years between 1959 and 1985. During the same period, the London Market Insurers sold Chemical Leaman excess coverage. The claims against LMI for the years 1958-1981 remained pending for decision by this Court. *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co., et al.*, ____ *F.*3d ___ (3rd Cir. 1995), s.o. at 8.

All of the policies provided coverage for damage arising from an "accident" or an "occurrence," that is, damage "neither expected nor intended from the standpoint of the insured." s. o. at 8-9. This accident or occurrence based coverage is common to the standard comprehensive liability policy in use since at least the early 1960's. The issue of intent has been the subject of a number of reported New Jersey decisions, the most important of which are summarized in the Court's opinion.

The Court issued its decision on October 12, 1995, reversing a jury verdict in favor of coverage, holding that there was no coverage as a matter of law for the period after 1968, and remanding for further factual findings on intent for the period before 1968. The Court reversed and remanded a district court decision to exclude evidence of discharges at other Chemical Leaman sites. The District Court, in a pre-*Morton* ruling, had said that the evidence could lead the jury to apply an objective

standard for intent, contrary to the applicable law requiring a subjective standard. This Court said that whether the insured "*should have known* that the rinsewater. . . system . . . would cause damage," an "objective standard," is "precisely the inquiry that is required." [emphasis in the original] s. o. at 40. It is this language and other references in the opinion to an objective standard that incorrectly expand the exceptional circumstances test contemplated by the New Jersey Supreme Court in *Morton*.

Amicus New Jersey disagrees that the state Supreme Court abandoned the inquiry into subjective intent in favor of a purely objective test in environmental cases where coverage is sought under the standard occurrence or accident language. The petition for rehearing by Chemical Leaman should be granted and the standard for intent should be corrected.

ARGUMENT

IN AN ENVIRONMENTAL COVERAGE CASE, THE INSURED'S INTENT TO CAUSE THE DAMAGE OR EXPECTATION THAT THE DAMAGE WOULD RESULT MAY BE SHOWN BY EXCEPTIONAL CIRCUMSTANCES RATHER THAN DIRECT EVIDENCE OF THE INSURED'S INTENT

The prevailing rule in New Jersey is that there will be insurance coverage for an injury resulting from the intentional acts of an insured if the insured did not subjectively intend to cause an injury. *Voorhees v. Preferred Mutual Ins. Co.*, 128 *N.J.* 165, 607 *A.*2d 1255 (1992). If the insured expected or intended some injury to result, but the actual injury far exceeds the insured's expectation or intention, or the injury is an improbable consequence of the intentional act, the court must make a further inquiry to determine the insured's subjective intent to cause the actual injury. *SL Industries, Inc. v. American Motorists Ins. Co., et al.*, 128 *N.J.* 188, 212, 607 *A.*2d 1266, 1278 (1992), adopting test in *Prudential Property & Casualty Ins. Co. v. Karlinski*, 251 *N.J.Super.* 457, 598 *A.2d* 918 (App.Div.1991). Intent may be presumed from the nature

of an intentional act, if the act is particularly reprehensible, such as the sexual assault of children. *Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Center, et al.*, 239 *N.J.Super.* 276, 571 *A.*2d 300 (App.Div.1990), certif. denied, 122 N.J. 127, 584 A.2d 218 (1990).

The requirement of subjective intent is consistent both with the language of the policy and with the essential purpose of liability policies to provide coverage for damages resulting from negligence, which may be defined as the insured's failure to exercise due care to prevent injury that could have been foreseen. *See, e.g. Trentacost v. Brussel*, 82 *N.J.* 214, 412 *A.* 2d 436 (1980). The question of intent in insurance coverage cases involves balancing of competing policy concerns in favor of compensating a victim and against relieving an insured of monetary responsibility for the insured's intentional acts that result in damages the insured expects or intends. *SL Industries*.

The New Jersey Supreme Court in *Morton* fashioned a rule for determining the insured's intent that balanced these concerns in the unique context of environmental coverage. That Court rejected the Appellate Division rule that intentional discharges into the environment are so egregious in and of themselves that the subjective intent to harm on the part of the insured could be presumed from the act of discharge. 134 N.J. at 86, 629 *A.2d* at 879. The Court recognized certain characteristics common to many environmental cases that complicate the inquiry into intent. The discharges may have occurred over varying periods of time, during which the specific understanding of the insured may have changed. The insured may not have been aware that discharges into the environment were occurring, or may not have been aware of the amount of discharge. The insured may not have known the substance discharged was a pollutant or that it was harmful. Governmental enforcement may range from none to frequent intervention ignored by the insured. There may or may not be direct evidence of the insured's subjective knowledge that harm was possible or likely. Because many discharges for which coverage is being sought occurred years ago, there often is no direct

evidence of subjective intent. 134 N.J. at 86-87, 629 *A.*2d at 880.

In order to resolve the difficulties inherent in proving the insured's intent, the New Jersey Supreme Court held that, in environmental coverage litigation, a case-by-case analysis is required to determine whether exceptional circumstances exist that objectively establish the insured's intent to injure. 134 *N.J.* at 86-87, 629 *A.2d* at 880. The question remains whether the insured intended or expected the harm, not the negligence standard of whether a reasonable person should have known the harm would result. Rather, the exceptional circumstances in an individual case must show that damage qualitatively comparable to the actual damage "must have been anticipated by [the insured]." 134 *N.J.* at 95, 629 *A.* 2d at 884. It was the specific knowledge that Morton's predecessors had through repeated complaints by regulators about the danger of their continuing discharges of mercury that was compelling for the New Jersey Supreme Court in *Morton. Id.*

In this case, this Court held that "under New Jersey law, the appropriate inquiry is the insured's objective intent" and that the district court erred in instructing the jury that "it must determine if Chemical Leaman subjectively 'expected or intended' to damage the environment." s.o. at 5. Morton did not establish an objective standard for intent. Instead, the New Jersey Supreme Court remained true to the policy language by keeping the focus on the particular insured in the particular case. The burden of proving that insured's intent or expectation is eased by permitting the use of extrinsic evidence to show that the insured must have known or expected the harm or qualitatively similar harm.

The Court in *Morton* stopped short of a finding of intent to cause environmental harm, instead concluding that the insured must have expected the damage, based on the history of communications sent to Morton's predecessors by regulators. This Court incorrectly drew the inference from that conclusion that New Jersey applies an objective standard in environmental coverage cases. s.o. at 28-29. The state court was

merely relying on the policy language that precludes coverage if the insured intended *or expected* the damage. That court was satisfied that the evidence showed at least the expectation of harm on the part of Morton's predecessors, and it did not need to decide whether they also intended the damage.

This Court's misunderstanding of Morton is clear when it says that the inquiry under *Morton* is whether the insured "should have known" that harm would result. While the *Morton* Court may have interjected an objective element into the search for subjective intent, the focus remains on the insured, not the mythical reasonable person conjured up by the classic negligence phrase "should have known." Indeed, an objective standard for intent under occurrence coverage akin to a negligence standard would nullify the essential purpose of an insurance policy. A person or a business buys insurance to protect against the risk of liability based on negligence.

The Third Circuit directs the trial court on remand to determine whether the damage to the environment was unforeseeable. s.o. at 38. Contrary to the Court's direction, *Karlinski* and *SL Industries* demand an inquiry into improbability, not unforeseeability. The two are not interchangeable. In *Karlinski*, the New Jersey Appellate Division found that it was improbable a young boy would suffer a fractured hip during a fist fight with the insured's son, so there was coverage. *SL Industries* adopted the improbability of the harm test as the best way to deter intentional wrongdoing while still meeting the reasonable expectations of an insured that there will be coverage for accidental damages. In *Morton* the Court applied the improbability of the harm test to the facts before it and found that the environmental harm there was not qualitatively improbable. Foreseeability is a negligence principle that should not be imported into coverage disputes where New Jersey courts have so clearly and consistently expressed the test as one of improbability.

While the *Morton* exceptional circumstances test adds an objective element to the search for the insured's intent, the focus remains on the insured in each case and the

circumstances in each test. New Jersey has not established an objective test for intent in environmental cases, contrary to the opinion recently issued by this Court. The reduction in coverage that could result if an objective test is applied may affect contaminated sites throughout New Jersey due to the widespread use of the standard occurrence language. The decision should be revisited and corrected.

CONCLUSION

For the reasons stated, the petition for rehearing by Chemical Leaman Tank Lines, Inc. should be granted.

Respectfully submitted,

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BY: /s/ Karen L. Jordan

Karen L. Jordan
Deputy Attorney General

Dated: October 26, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5794

CHEMICAL LEAMAN TANK LINES, INC.,

Appellee,

v.

AETNA CASUALTY AND SURETY CO., et al.,

AETNA CASUALTY AND SURETY CO.,

Appellant

On appeal from the Final Judgment
of the United States District Court
for the District of New Jersey,
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Because the evidence is undisputed that Chemical Leaman expected or intended some injury and that the actual damage was a probable result of its actions, there was no "occurrence." This Court should therefore reverse and remand for entry of judgment in Aetna's favor on all policies. At a minimum, a new trial is required on Questions B and C.

B. The "exceptional circumstances" question requires the factfinder to consider all available evidence to determine whether the insured objectively expected or intended to cause injury.

In *Morton*, the New Jersey Supreme Court recognized the implausibility of expecting those who pollute to confess that they meant to cause harm:

> Although insureds may concede that pollutants--even known pollutants--had been intentionally discharged, those insureds are virtually certain to insist that the resultant harm was unintended and unexpected. Absent "smoking gun" testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in coverage litigation.

Id., 629 A.2d at 879. The court thus called for an analysis of whether the available evidence objectively supports the conclusion that the insured intended to cause environmental harm. *Id.* at 880.[18] This is Question A. The court identified five factors to be considered in answering the objective-evidence question: (1) duration of discharges; (2) whether discharges were intentional, negligent or innocent; (3) knowledge of pollutants' dangerous propensities; (4) whether regulators tried to discourage the conduct; and (5) subjective knowledge of possibility or likelihood of harm.

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[18] "Objectively" thus refers to evidence that is available and verifiable, if perhaps only circumstantial. The *Morton* court recognized that evidence of the facts it laid out would be both more readily available and more reliable than self-serving "direct" evidence of subjective intent.

Here, the lower court thought it was permissible to infer intent to cause harm from objective evidence only if the insured's polluting acts were, as a matter of law, as odious as the child molestation addressed in an earlier New Jersey case. Ex.B at 19-22; Ex.G at 6-7. It did not consider the five factors. The court thus erred in formulating the standard, applying it, and refusing to allow the jury to consider it. Aetna is entitled to a new trial on this issue.

1. "Reprehensible conduct" is no longer required.

As below, Chemical Leaman continues to assert (at 20-23) that only "particularly reprehensible conduct" akin to child molestation can warrant an inference that the insured intended to injure the environment. But the Supreme Court in *Morton*, 629 A.2d at 879-80, held that objective evidence could be used in circumstances other than those like the "particularly reprehensible" conduct of child molestation, *see Atlantic Employers v. Tots & Toddlers*, 239 N.J. Super. 276, 571 A.2d 300 (App. Div.), *certif. denied*, 122 N.J. 147, 584 A.2d 218 (1990). Under the *Morton* court's much less rigorous test, the issue is only whether, using the five factors as guides, the insured objectively expected or intended to cause harm. The lower court's failure to undertake a *Morton* analysis of "exceptional circumstances" was reversible error.

2. The evidence objectively shows Chemical Leaman's intent to injure.

Aetna's initial brief (at 30-35) reviewed the wealth of facts objectively establishing Chemical Leaman's intent to cause harm. Chemical Leaman (at 23-32) does not effectively rebut these facts. Rather, it attempts to return to the outdated "particularly reprehensible" analysis by injecting *scienter* and a specific intent to cause the resulting harm into each factor in order to narrow the scope of *Morton*'s objective test. Those efforts fail.

a. Duration of the discharges

Fifteen years of continuous pollution by Chemical Leaman are more than sufficient to place this factor in favor of the carriers.

b. Intent, negligence, or innocence of discharges

In its opening brief, Aetna shows that Chemical Leaman deliberately discharged 100,000,000 gallons of pollutants into sandy New Jersey soil over many years. The trial court expressly found that "Chemical Leaman intended to discharge known environmentally hazardous contaminants into the soil at the Bridgeport site." Ex.D at 4 ¶ 22. Likewise, after considering all of the evidence, the jury concluded that Chemical Leaman's "overflow pipe" releases were intentional. JA 14431-32. Thus it is clear that the discharges were intentional, not innocent.

Nonetheless, Chemical Leaman contents (at 27) that its sustained discharge of pollutants into the soil was innocent because it "believed that the earth would purify liquid wastes." This argument misreads the proper test to be applied. The question does not focus on whether Chemical Leaman believed its discharges would *harm* the environment. Rather, the issue is only whether its "discharges occurred intentionally." The jury and the court concluded that they did. Thus, this factor clearly favors the insurers.

c. Quality of the insured's knowledge concerning the pollutants' harmful propensities

Aetna's initial brief (at 32) notes that the district court correctly found that Chemical Leaman was aware of the environmental hazards of its pollutants. Ex.C at 3; Ex.D at 4 ¶¶ 18-22. In an attempt to erase the court's clear factual findings, Chemical Leaman argues (at 28-29) that it was discharging only "trace amounts" of chemicals which it allegedly believed were harmless in that state.

The first flaw in this argument is the notion that watering down toxic chemicals renders them harmless. But even if dilution could ever be a defense, it would not be so here. Chemical Leaman discharged more pollutants than the *Morton* insured. The *Morton* insured discharged "two to four pounds per day" of *raw chemicals*" (at 24 n.13, 28). In contrast, Chemical Leaman discharged over 25 pounds a day of phenols alone. Its expert testified that 30,000 gallons of liquid waste leached into the soil every day. JA 7007-08 (McLane Dep.). The daily discharge of 30,000 gallons, containing 110 mg/l of phenols, amounts to 27.5 pounds of "raw phenols" per day. Moreover, what Chemical Leaman refers to as "trace amounts" are in fact highly toxic. The groundwater contamination at Bridgeport contains hundreds or even thousands of times the acceptable levels of chlorobenzene (150 times), lead (233 times), benzene (300 times), 1, 2 dichloroethane (700 times), vinyl chloride (4,400 times), and trans 1, 2 dichloroethylene (6,900 times the acceptable limit). *See* JA 11937A33-35 (Record of Decision). Indeed, the pollutants that Chemical Leaman discharged into the soil were more concentrated than those at issue in *Morton* (*i.e.*, mercury at 7 parts per million in 1970). *Id.*, 629 A.2d at 841. To illustrate, Chemical Leaman's wastes in November 1968 contained 110 mg/l (*i.e.*, 110 parts per million) of phenols alone *after treatment*. JA 11773 (inspection report).[19] The "diluted" pollutants were clearly not harmless and Chemical Leaman could not reasonably have believed them harmless.[20] This factor unambiguously favors denial of coverage.

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[19] Chemical Leaman also exceeded acceptable emission levels by more than did the *Morton* insured during comparable time periods. Compare JA 11798-99 (6/1973 DEPE letter re: plan to *reduce* phenols to 10.8 times the acceptable level of 0.25 parts per million) *with Morton*, 629 A.2d at 841 (Ventron was discharging 8.4 times as much mercury per day as permitted by Federal Water Quality Administration).

[20] The settled trial evidence shows that the groundwater and soil contain arsenic, lead, mercury, cadmium, beryllium, chromium, antimony, nickel, and zinc. JA 11937 A24-28(Record of Decision), which of course are not biodegradable. JA 10861 (McLane Tr.). In addition to phenols and heavy

(Footnote continued)

d. Intervention of regulatory authorities

In its initial brief (at 33, 34-35), Aetna points to various New Jersey authorities' repeated attempts to stop Chemical Leaman from polluting the environment at Bridgeport, and notes Chemical Leaman's sustained violation of the State regulatory scheme. Chemical Leaman misreads the law in arguing (at 29) that the State's efforts were directed at harm different from what ultimately resulted. Although government officials in *Morton* did not focus on any particular environmental medium, or even on mercury as the key contaminant until 1970, *see* 629 A.2d at 842-843, that court nonetheless found the insured's knowledge of other likely harm to the creek to be sufficient to take the discharges out of the policies, *id.* at 883.

Moreover, the record fully documents Chemical Leaman's continuing failure to obtain the necessary permits for lagooning and discharge of chemicals. JA 11773 (11/1968 inspection report); JA 13352 (2/26/69 order). That this failure was allegedly "unwitting" is irrelevant. It was still unlawful. Indeed, perhaps the best evidence of "whether regulatory authorities attempted to discourage or prevent the insured's conduct," *Morton*, 629 A.2d at 880, can be found in the very regulatory scheme Chemical Leaman violated, which was designed to prevent pollution of the "waters of the state," including "ground water."[21] It is settled that various regulatory

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metals, Chemical Leaman discharged other known toxic wastes such as aniline, chloroform, weed killer, methanol, toluene, and vinyl chloride. JA 10163-65 (Elston Tr.). 11803-16 (list of products cleaned), 11937A24-25 (Record of Decision).

[21] *See* N.J.S.A. § 58:12-1 (1940), JA 11749 (definition); § 58:12-3 (1940), JA 11752-3 (permit requirement). *See also* N.J.S.A. § 58:10-5 (1940), JA 11739 (pollution of fresh water prohibited without Department of Health permit); § 58:10-18 (1940), JA 11744 (permit requirements); N.J.S.A. § 58:11-10, -12(1940), JA 11746-47 (Department of Health approval required for any change in sewage or industrial waste treatment system: owner of such system must periodically furnish information required by the department); New Jersey Dept. of Health Rules and Regulations for the Preparation and Submission of Designs for Sewer Systems (1958), *(Footnote continued)*

authorities attempted to force Chemical Leaman to change its ways as early as 1961, and that its illegal discharges continued for years after formal proceedings were instituted in 1969. This factor also favors the carriers.

e. Subjective knowledge concerning the possibility or likelihood of harm

The fifth consideration here is whether Chemical Leaman knew of the "possibility or likelihood of harm." *Morton*, 629 A.2d at 880. The facts show a clear awareness. The discharge of tons of pollutants into soil and wetlands certainly makes environmental harm possible or likely. But claiming ignorance as a defense, Chemical Leaman argues (at 24-28) that (1) it would not knowingly have polluted its own well, (2) percolation was not then considered dangerous, (3) it designed the terminal hoping to prevent harm to the environment, and (4) the danger was not obvious to outsiders who visited the site.

The first response is that from the beginning Chemical Leaman recognized the danger of fouling its own well, *see* JA 9931-3 (Elston Tr.), and accordingly located it more than 250 feet away and upgradient from the nearest lagoon. JA 12231 (map of contaminant plumes), 12230 (water table elevations). Its own expert, Charles McLane, confirmed that this concern was well-founded, because contaminants reached the groundwater within "no longer than a few days, probably less than that." JA 10807.

Similarly, the record shows that Chemical Leaman is factually incorrect in arguing that experts in the 1960s believed that soil percolation would prevent groundwater

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Defendants' Trial Brief Ex.17 (filed March 8, 1993) JA 9023A (construction or modification of an industrial waste treatment plant required application to Department of Health, including engineer's report and detailed plans and specifications, with daily flow rate, character of influent, discharge point and treatability studies). *Cf. Hatco*, 801 F. Supp. at 1376 (lack of record evidence of regulatory scheme may be evidence of accidental occurrence).

contamination. A 1955 text warned that "seepage [from absorption lagoons] ultimately reaches a stream or an underground water stratum; hence absorption lagoons should not be employed for toxic wastes." JA 6476-80 (Gurnham, *Principles of Industrial Waste Treatment* 319 (1955)).[22] McLane testified on cross-examination that experts knew that the soil could not remove heavy metals and that adsorption would not purify the soil. JA 10861. Logically, it would be physically impossible for 100,000,000 gallons of contaminated liquids not to enter the groundwater by saturating the 30 inches of

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[22] Chemical Leaman (at 27) would have this Court take judicial notice of statements in an opinion in an unrelated case. However, in that case this Court relied on the limited record before the district court -- not on judicial notice. *See New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1167 & nn.4-5 (3d Cir. 1991), *citing New Castle County v. Cont'l Cas. Co.*, 725 F. Supp. 800, 803 n.4, 804 (D. Del. 1989). Scholars and courts that have taken a close look at the issue have concluded that industry was on full notice of the dangers of groundwater contamination. *See, e.g.*, C.E. Colten, "A Historical Perspective on Industrial Wastes and Groundwater Contamination," 81 Geographical Rev. 215, 226 (1991) ("By the early 1950s, governmental agencies, professional organizations, and industry-trade associations...recognized underground water...could transport chemicals in solution across substantial distance," so that "the use of lagoons or infiltration ponds...[for waste treatment was] unsafe and irresponsible in most environmental settings"); E.W. Kleppinger, "Changes in Superfund Liability Would Escalate Costs." 5:17 *Mealey's Litig. Reports - Superfund* 20, 27 (Dec. 10, 1992) ("any intelligent person engaged in the profession of environmental control...could not leave the 1950s without an understanding that water soluble fractions of wastes could, would, and do contaminate groundwaters"); *Sterling v. Velsicol Chemical Corp.*, 647 F. Supp. 303, 387-405 (W.D. Tenn. 1986) (reporting and ruling on evidence of "State of the Art in 1961"), *aff'd in part, rev'd in part*, 855 F.2d 1188 (6th Cir. 1988).

Since the early 20th century New Jersey courts have recognized a duty of landowners not to allow pollutants to percolate into the groundwater on their own land and thence be carried onto neighbors' property. *See P. Ballantine & Sons v. Public Service Corp.*, 86 N.J.L. 331, 91 A. 95, 96 (Err. & App. 1914); *P. Ballantine & Sons v. Public Service Corp.*, 76 N.J.L. 358, 70 A. 167 (Err. & App. 1908). Recognition of such a duty necessarily implies knowledge of the possibility and preventability of groundwater contamination and its migration.

sandy soil separating the bottom of the lowest pit from the water table.[23]

Chemical Leaman's professed desire to protect the environment by using lagoons, even if sincere, is immaterial. The issue is whether the insured realized that some environmental harm was a possible consequence of its acts. Even the *Morton* insured made efforts to lessen harm to the environment. Like Chemical Leaman, it used settling as "treatment"; but unlike Chemical Leaman, the *Morton* insured also took steps to *prevent* seepage into the ground. *See Morton*, 629 A.2d at 839-841 (use of settling "tanks" by the 1950s, a storm drain by 1960, a tile sewer and collecting sump by 1965).

Outsiders believed Chemical Leaman was taking similar precautions to line its settling ponds.[24] Because their beliefs were incorrect, their alleged lack of complaints does not help Chemical Leaman.[25] In sum, the fifth factor favors the carriers.

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[23] *See* JA 10809 (McLane Tr.). In addition, the lower court erroneously excluded other evidence confirming that Chemical Leaman *did* have subjective knowledge in the early 1960s both of the possibility of groundwater contamination from its harmful chemicals and of the necessity of using lined, rather than unlined, impoundments to prevent such harm. *See* Section III, *infra*.

[24] New Jersey Fish, Game & Wildlife Officer Robinson "couldn't tell," but testified that an "impervious liner...is the normal way things are done. You do put a liner in here to prevent the stuff from going into the ground." JA 7013-14 (Dep.). Aetna engineer Hughes thought the pits were lined because they were always full when he visited the terminal. JA 10556.

[25] Contrary to the inference Chemical Leaman seeks (at 24-25, 36, 72 & n.46), Hughes' testimony was that he visited the Bridgeport terminal primarily for the purpose of assessing automobile liability and workers' compensation risks. Hughes was not concerned with environmental hazards because Aetna "did not cover that phase of [Chemical Leaman's] exposure." JA 10483-84, 10494, 10552-53. For many years, Chemical Leaman's biggest loss control problem at Bridgeport was injuries in falls from its trucks. JA 10559-60 (Hughes Tr.) The "specific instructions to look for waste disposal concerns," Brief for Appellee at 36, related to

(Footnote continued)

Overall, the "exceptional circumstances" question does not ask whether the evidence established "that the damage from the insured's conduct 'can never be an accident.'" Brief for Appellee at 32. Rather, it asks whether the evidence points objectively to the conclusion that the insured intended or expected pollution damage. The answer here is affirmative. Because the court below never properly addressed this question, Aetna is entitled to a new trial.

3. A jury may decide the "exceptional circumstances" question.

The trial court also erred in not permitting the jury to consider the "exceptional circumstances" issue. Chemical Leaman incorrectly argues (at 22) that the question should be jettisoned if the carriers cannot prevail on summary judgment. But nowhere does the *Morton* court say that a jury should never weigh exceptional circumstances. Just the opposite conclusion is warranted by the intensely factual nature of the five factors enunciated by the Supreme Court in *Morton*. If the insurer does not ask for or win summary judgment on the objective evidence, the jury must decide that question.[26] The court's failure to submit the "exceptional circumstances" question to the jury was also reversible error.[27]

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averting workers' compensation losses incident to workers' handling and disposal of pure "heel." JA 10505-06 (Hughes Tr.). The only Aetna engineering reports to mention pollution exposure date from 1981, at the very end of the policies at issue and long after the waste was trucked to DuPont. JA 13548 (Hughes Tr.); *see* JA 3544-48, 3652 (Aetna engineering reports).

[26] Aetna requested a jury charge on inferred intent, consistent with the "exceptional circumstances" question. JA 8871-2. The court then removed this issue entirely from the jury in its opinion granting partial summary judgment. Ex.B at 19-22. The court also denied Aetna's Rule 50(a) and 50(b) motions on the issue. JA 10996-7; 11386-8; 14520-8 (Aetna motions); JA 11420 Ex.G at 6-7; Ex.H at 3-4 (court's rulings).

[27] As noted in Aetna's initial brief (at 45), Aetna's policies also excluded coverage for damage to property "used by" the insured. Chemical Leaman (at 93 n.60) claims the carriers waived this issue, and DEPE ignores it.

(Footnote continued)

III. The lower court's failure to anticipate *Morton* flawed its attempted exercise of discretion under Evidence Rules 403 and 611 with respect to evidence of Chemical Leaman's knowledge of environmental harm at Bridgeport.

Aetna showed in its opening brief (at 35-41) that the lower court's inaccurate predictions of New Jersey law contributed to its failure to properly exercise discretion under Federal Rules of Evidence 403 and 611 to admit highly probative evidence. Chemical Leaman responds (at 40-53) that it was not error to refuse to allow the carriers to use a few of the documents proffered to impeach Harry Elston, that admission would have required "mini-trials" as to each site other than Bridgeport, and that the evidence would have been only marginally relevant and unfairly prejudicial despite the *Morton* "exceptional circumstances" question.[28]

Elston told the jury that his "first knowledge of the fact unlined lagoons could cause groundwater contamination would have to be some time 1970 or after." JA 9935. Neither the question nor Elston's response was site-specific. Yet the court prevented Aetna from confronting Elston with a 1963 letter addressed to his boss and Elston's response acknowledging

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But in the argument on Chemical Leaman's Rule 50(a) motion, carrier counsel specifically argued that Chemical Leaman's use of its groundwater was tantamount to owning it. JA 11378. The record shows that Chemical Leaman used its groundwater for drinking and its soil for waste disposal. The lower court improperly removed this issue from the jury.

[28] Chemical Leaman also (at 41) tries to justify the exclusion on the basis of the number of exhibits premarked and potential witnesses identified by Aetna pretrial. It is prudent to proffer substantially more evidence than one may need to use, particularly when the court has yet to allocate the burden of proof. Here, the lower court did not consider limiting the carriers to a certain amount of evidence concerning other sites. Rather, it rejected even Aetna's subsequent, limited proffer of only 14 "other site" documents (JA 11842-911) and no witnesses to impeach Harry Elston's testimony to Chemical Leaman's innocent ignorance.

groundwater, stream and well contamination at the Paris, Pennsylvania terminal, and taking credit for a 75% reduction in the level of phenols since the lagoons there had been "sealed" in order to "stop any seepage of . . . wastes into the underground waters of the State." JA 11842-44.

These and other documents would have shown that Elston was not truthful about many things, including his testimony that he was unaware of the *possibility* of groundwater contamination from unlined lagoons,[29] or from dilute pollutants.[30]

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[29] *See, e.g.*, JA 11885-86 (4/25/1960 letter from West Virginia authorities: leaching from Chemical Leaman's unlined Big Scary pits threatened to contaminate neighbor's well); JA 14845-46 (Elston Dep.) (Chemical Leaman segregated phenols from other waste at Paris terminal); JA 11845 (Elston letter) (same at Institute, West Virginia); JA 11899, 11907-08 (operational report) (acids, oils, phenols and other "poisons" were dumped into Big Scary lagoons, though "[t]his is not the best practice" and would "cause problems with [the Big Scary] disposal area"). The excluded evidence would also have shown Chemical Leaman's pattern and practice of ignoring or stonewalling warnings of possible or actual harm resulting from its wastewater disposal. *See Morton*, 629 A.2d at 882.

[30] For example, the documents objectively prove Chemical Leaman's awareness of the *potential* for groundwater contamination at Paris, regardless of whether that site was as susceptible to groundwater contamination as if it had sandy soil just above the water table. Indeed, if groundwater contamination resulted from the deposit of wastewater in a mine (constructed to avoid contact with groundwater), one must expect an even more severe threat to groundwater by the disposal of chemicals in sandy soil near the water table. *See* JA 10806-8 (McLane Tr.). No record evidence or discovery supported Chemical Leaman's proffer of testimony as to Paris' "unique geological feature." Brief for Appellee at 41; JA 11360 (colloquy).

The situation is the same with the other categories of evidence contained in the proffer, to Elston's claims that only "accredited landfills" were used as disposal sites, JA 9930, and that Chemical Leaman dumped only diluted rinsewaters near people's wells because "chemicals and rinsewater are two separate items," JA 9934. Proffered documents written by Elston reflect that phenols, acids, oil, poisons and latex were hauled away to the Scary Creek ponds, which even Chemical Leaman does not call an "accredited landfill" but which were located adjacent to the neighbor's well. JA 11899, 11907-08 (operational report). Chemical Leaman could not have denied to the jury that the well adjacent to Big Scary was

(Footnote continued)

The court's rulings incorrectly left the jury with the impression that Chemical Leaman thought it was using state-of-the-art disposal techniques that could not have been expected to harm the environment, and that Elston was credible in so testifying. Failure to allow full cross-examination was reversible error.[31]

The record does not support the conclusion of the court below that the excluded evidence would have led to lengthy "mini-trials" about other sites. Ex.E at 5. More importantly, the court could not properly weigh any incremental delay in a three-week trial because it did not appreciate the evidence's materiality.[32]

Chemical Leaman cites several cases (at 49-51) for the proposition that the trial court had the discretion to exclude

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contaminated, *see* Brief for Appellee at 42-43, since Elston admitted that it was (though allegedly by the well owner), JA 14844 (Elston Dep.). Nor does record evidence support Chemical Leaman's claim (at 42-43 & n.24) that the well owner refused to permit testing. The record does show that Chemical Leaman deeded its $18,000 property to the well owner in settlement, JA 11866-68, and that West Virginia authorities ordered Chemical Leaman to cease using the Big Scary lagoons, JA 11887.

[31] *See, e.g., Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (reversing trial court's exclusion of evidence of another accident, where claimant was not permitted to impeach testimony that no other accidents occurred); *Berry v. Monongahela Connecting Railroad Co.*, 397 F.2d 181, 184 (3d Cir. 1968) (reversing trial court's exclusion of evidence that went to credibility of "material witness" in "matters crucial or material to the issues at trial").

[32] The proffered "other site" evidence would have proven notice and knowledge of the possibility or likelihood of harm under the "exceptional circumstances" test. The lower court excluded the evidence because the jury might find what Chemical Leaman "should have known." Ex. E at 5. What an insured "should have known" is not an ultimate issue, but is under *Morton* objective evidence of intent since it involves an insured's "subjective knowledge concerning the *possibility or likelihood of harm*." *Id.*, 629 A.2d at 880 (emphasis added). Without such evidence the jury (and court) cannot properly weigh the objective evidence or determine the insured's actual intent.

the proffered evidence under Federal Rule of Evidence 403. In those cases, however, the evidence was offered as speculative proof of causation, rather than of actual knowledge, notice, or some other issue relevant to this case.[33]

Nachtsheim does not support the trial court's refusal to allow the insurers to impeach Elston. The *Nachtsheim* court refused to admit the cross examination document because it was not proffered until the witness had been excused and could not be recalled. *Id.* at 1275-76. That is a far cry from the situation with Elston.

Chemical Leaman's defense to the "some injury," "improbability," and "actual injury" questions focused on Elston's alleged subjective belief that soil percolation removed chemicals from water and his alleged ignorance that leaching from unlined lagoons *could* contaminate the groundwater. The excluded evidence would have shown the jury that these assertions were false and that Chemical Leaman must have expected or anticipated damage to the groundwater as well as

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[33] In *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988), Chemical Leaman's primary authority, the plaintiff attempted to introduce evidence of two similar "accidents" to show causation (that defective design led to ice buildup on the airframe). *Id.*, 847 F.2d at 1271-72. The court refused to allow evidence about one crash without proof that that accident was caused by ice buildup, but *did* permit testimony regarding a second incident because there was proof that the same *problem* occurred. *Id.* at 1269. That court also noted that the standard under Rule 403 was less strict when such evidence is used (as here) to show awareness of a dangerous condition. *Id.* at 1268 n.9.

In *Tait v. Armor Elevator Co.*, 958 F.2d 563, 565, 567 (3d Cir. 1992), the plaintiff was injured when one elevator of several stopped abruptly. This Court affirmed the exclusion of elevator logs and expert testimony offering a "purely speculative" theory of causation based on their complaints concerning other elevators. *Id.* at 568-69. In *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88 (3d Cir. 1983), a similarly inapposite causation case, the properly excluded document addressed a different problem allegedly caused by a different design.

the soil and swamp,[34] even after the "treatment" at the Bridgeport terminal.[35]

IV. The Court may not apply "regulatory estoppel" against Aetna.

From 1971 forward, Chemical Leaman purchased insurance from Aetna that, because of the pollution exclusion clause, did not apply to pollution damage unless the discharge was both "sudden" and "accidental." As shown in Section I, the meaning of "accidental" under *Morton* requires the entry of judgment in Aetna's favor. Moreover, by no stretch of the imagination could Chemical Leaman's fifteen years of discharges be considered temporally "abrupt," which is how the *Morton* court read the plain meaning of "sudden." 629 A.2d at 871. On appeal, however, Chemical Leaman and DEPE, its *amicus*, contend that this Court should, and constitutionally may, apply against Aetna the same "regulatory estoppel" applied against other insurers by the Morton court. This contention lacks both factual and legal support.

At trial, Chemical Leaman presented no evidence of any alleged misrepresentations by Aetna (or anyone else) to the regulatory authorities who approved the standard pollution exclusion clause in the early 1970's.[36] Therefore, any "estoppel" applied in this case against Aetna would have to be

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[34] If evidence of an insured's knowledge from other sites will be inadmissible, then an insured may pollute indefinitely at its insurers' expense simply by switching waste sites on discovery of actual damage.

[35] If expectation of harm were relevant under the improbability question, Chemical Leaman's previous experiences at other sites would be relevant to that determination as well. If the court correctly found migration into the groundwater a separate "discharge," then the excluded evidence would have also shown that such migration was expected by 1971.

[36] Chemical Leaman raised estoppel for the first time below in its reply brief supporting summary judgment. The district court properly refused to consider the issue then as untimely. Ex. B at 47 n.16. Thereafter, Chemical Leaman abandoned the issue, never seeking to present evidence at trial, and never appealing the trial court's ruling.

based on the fact-intensive findings made *sua sponte* by the Supreme Court in *Morton*. The problem is that the *Morton* court denied the insurer parties any evidentiary hearing, or even notice that there was a possibility they would be estopped to enforce clear contractual language. Moreover, Aetna has had no fair opportunity to litigate the factual predicate to any sort of estoppel.

In *Morton*, equitable estoppel was not at issue at the trial level, was never raised at the intermediate appellate level, and was absent from the briefs and arguments presented to the New Jersey Supreme Court.[37] Indeed, equitable-estoppel issues were unilaterally injected into the case by the Supreme Court after the insurers' opportunity to present evidence addressing those issues had passed. Constitutional due process requires that, before being deprived of the benefits of what the Supreme Court found to be a plainly worded contract, insurers be given notice and a meaningful opportunity to counter the factual basis for any theory supporting such a deprivation.[38]

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[37] The *Morton* policyholder prevailed on the pollution exclusion in the appellate division and did not seek certification from the New Jersey Supreme Court on that issue. The insurers' cross-petition for certification sought review of a line of intermediate appellate cases, including *Broadwell Realty Services, Inc. v. Fidelity & Cas. Co.*, 218 N.J. 516, 528 A.2d 76 (App. Div. 1987), which had found the standard pollution exclusion "ambiguous." In response to that petition, the policyholder alleged ambiguity but not estoppel. Indeed, no party to *Morton* ever argued for estoppel at any time.

[38] DEPE further argues (at 10-14) for regulatory estoppel on the basis that this Court has no appellate jurisdiction over the New Jersey Supreme Court and that the appellants are bound by *res judicata*. This argument is frivolous. Aetna was not a party to the *Morton* appeal. The question before this Court is not which party should prevail in *Morton*, but which party should prevail in this case.

A. Contrary to DEPE's assertions, the *Morton* decision was predicated upon the traditional doctrine of equitable estoppel.

DEPE (at 22-23) attempts to defend and extend *Morton* by falsely characterizing its holding. According to DEPE, the *Morton* decision did not turn on the various elements of the traditional doctrine of equitable estoppel, but was instead predicated upon a novel concept of regulatory estoppel that supposedly focuses exclusively on the "representations" made to state insurance regulators in 1970-71. This position cannot be squared with the *Morton* decision, 629 A.2d at 873, in which the court expressly predicated its decision upon the traditional doctrine of equitable estoppel enunciated in *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 255 A.2d 208 (1969). *Harr* set forth, and *Morton* adopted, the three well-established factual elements of an equitable estoppel -- misrepresentation, reasonable reliance, and detriment. *Morton*, 629 A.2d at 873. The *Morton* court then proceeded explicitly to made *de novo* factual determinations, summarily and on the basis of non-evidential materials, concerning those prerequisites.[39]

The intensely factual nature of the equitable-estoppel theory on which the Supreme Court relied is central to Aetna's due process claim here. By rejecting the ambiguity arguments of Morton and its *amici* (and the *Broadwell* case on which they relied), the Supreme Court's decision turned on three *factual* inquiries going well beyond the face of 1970-71 representations -- (1) whether the IRB's representations to state insurance regulators constituted misrepresentations at the time, (2) whether, concerning the "plain meaning" of the proposed clause, New Jersey's expert regulators relied upon the alleged misrepresentations, and (3) whether the absence of a corresponding rate reduction constituted the detriment

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[39] In *Harr* and the other New Jersey estoppel cases cited by the *Morton* court, the matter was remanded for factfinding. *Harr*, 255 A.2d at 220-221; *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 495 A.2d 406 (1985); *Griggs v. Bertram*, 88 N.J. 347, 443 A.2d 163 (1982).

required under equitable estoppel. All of these issues are sharply disputed.[40] Neither Chemical Leaman or DEPE has rebutted the fundamentally unfair nature of the process by which the court summarily resolved those factual questions.

The *Morton* court had no factual basis for its conclusion that New Jersey's regulators (or those of any other state) failed to understand the "plain meaning" of the pollution-exclusion clause in 1970 because of a supposedly misleading paragraph in the IRB *Explanation*. More than 20 years after the pollution-exclusion clause was approved by the New Jersey Department of Insurance, the Supreme Court *sua sponte* invalidated the regulatory approval on the basis that state regulators were misled in 1970 and "would not readily have understood" the clause. *Morton*, 629 A.2d at 848. Instead of providing a factual basis for this conclusion, DEPE asserts (at 21-22) that principles of New Jersey administrative law preclude inquiry into the mental processes of the New Jersey regulators. In other words, the court itself addressed the mental processes of state regulators, made factual determinations without any evidential basis concerning those mental processes, and simultaneously denied the insurers a meaningful opportunity to confront and rebut those determinations with evidence.

B. Contrary to DEPE's assertions, the insurers had no occasion or opportunity to marshal their defenses against potential imposition of an equitable estoppel.

DEPE (at 20-21) also claims that petitioners had adequate notice and opportunity to defend themselves, and denies that the *Morton* court invoked the theory of estoppel sua sponte.

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[40] To illustrate, the *Morton* court considered the absence of an exclusion-triggered rate decrease to be so important to its holding that the opinion returned to that topic several times. *Id.*, 629 A.2d at 851, 853, 872-73, 874-75. Yet the court never offered any basis for its *de novo* determination that a rate reduction would have been "inescapable," *id.* at 872, had 1970 regulators understood the pollution-exclusion clause.

However, a review of the record below and the record in *Morton* shows (1) that neither Morton nor its *amici* ever proposed that the insurers be equitably estopped from enforcing the pollution-exclusion clause as written, (2) neither Morton nor its *amici* ever introduced any evidence on the factual prerequisites to equitable estoppel, and (3) the insurers never had a fair opportunity to introduce their own proof on those points or to test adverse proof. In the end, DEPE's position is that regarding the pollution-exclusion clause, insurers in *Morton* were always legitimately at risk, regardless of the theory, regardless of the stage of the proceeding, and regardless of whether they were given a fair opportunity to respond, simply because the insurers knew that the pollution-exclusion clause was the subject of (unavailing) ambiguity arguments in the case. But the Due Process Clause requires meaningful notice and opportunity to defend, including the opportunity to contradict adverse allegations or evidence. That requirements is not met when factual issues that ultimately prove dispositive are never framed with specificity and litigants therefore have no basis on which to marshal an adequate evidentiary record. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 120-21 (1991) (due process requires "adequate notice of the critical issue that the [court] was actually debating" as the "bedrock of any constitutionally fair procedure").

As DEPE notes (at 20), the *Morton* record was voluminous, with *amici* on each side submitting to the Supreme Court materials concerning regulatory history. Among those materials was a submission by Aetna responding solely to the ambiguity arguments advanced by Morton. Aetna's materials were not directed to the separate issue of equitable estoppel, which neither the carrier parties nor Aetna knew to be in the case. The record in *Morton* also shows that the insurers repeatedly stressed that the materials submitted to the Supreme Court were *not* a substitute for a full and fair opportunity to create an evidentiary record. Nonetheless, the *Morton* court held that a hearing to test the completeness and import of the pollution exclusion's history would be "redundant." *Id.*, 629 A.2d at 848.

While DEPE concedes (at 18) that due process requires an opportunity to be heard "at a meaningful time and a meaningful manner," *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), it nonetheless argues (at 21) that the due process requirements were satisfied because the insurers had an opportunity to request reconsideration. The speciousness of this argument is confirmed by the fact that the *Morton* court abruptly denied reconsideration without comment despite receiving 44 affidavits of 1970-era regulators that sharply disputed critical facts found in the estoppel opinion.[41] A violation of due process can only be remedied by "wiping the slate clean" and thereby restoring litigants "to the position [they] would have occupied had due process of law been accorded to [them] in the first place." *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 87 (1988); *see Saunders v. Shaw*, 244 U.S. 317, 319-20 (1917). That requirement is not met by the mere existence of a formal opportunity to apply for discretionary rehearing.

The New Jersey Department of Insurance certainly could not, in 1993, consistent with due process, cite case reports, journal articles, and 1970 regulatory records relied upon by the *Morton* court and summarily revoke the 1970 regulatory approval of the pollution exclusion on an equitable-estoppel theory. A venerable opinion of Justice Cardozo condemned just such a procedure, holding that a state administrative agency may not interject factual issues into a proceeding at the last moment and then summarily resolve them by reference to case reports, journal articles, and fragmentary records of other proceedings. *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 296-300 (1937). This principle applies to state courts as well as administrative agencies. *See*

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[41] Included among the affidavits were those of New Jersey, West Virginia and New York regulators that contradicted the court's findings that regulators everywhere, those states included, had been misled. *Cf. Morton* , 629 A.2d at 855, 870. It is fundamentally unfair for a court to accept evidence on one side alone, or to decide a disputed factual issue without cross-examination or a jury trial. *See also Oswin*, 609 A.2d at 430.

Garner v. Louisiana, 368 U.S. 157, 173 (1961) (assuming that the holding of *Ohio Bell* applies to state courts). Indeed, the United States Supreme Court has held that if litigants have not had "the proper opportunity to present [rebuttal] evidence," a state supreme court must remand after announcing the governing legal principles. *Saunders*, 244 U.S. at 319 (1917) (Holmes, J.).

At its core, the Due Process Clause requires (1) notice of the issues, *see Peralta*, 485 U.S. at 84-85; *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); (2) the right to an appropriate hearing, *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes*, 407 U.S. at 82; *Bell v. Burson*, 402 U.S. 535, 541-42 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); (3) the opportunity to present evidence on disputed material facts and, in appropriate circumstances, to challenge adverse evidence and witnesses through confrontation and cross-examination, *see Little v. Streater*, 452 U.S. 1, 13-16 (1981); *Greene v. McElroy*, 360 U.S. 474, 497-502 (1959); *Saunders*, 244 U.S. at 319; and (4) consideration by an unbiased tribunal, *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). These core protections must be extended no matter how late the issue arises in the proceedings below, *see Saunders*, 244 U.S. at 319-20; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930), and even though the granting of an evidentiary hearing may cause additional delays, inefficiencies, and expense, *see Bell*, 402 U.S. at 540-41.

Here, much as in *Ohio Bell*, it was only after the state high court's decision invoking equitable-estoppel principles *sua sponte* that petitioners were apprised of the controlling issue. Yet the *Morton* court rejected insurers' repeated requests for a "fair and open hearing," *cf. Ohio Bell*, 301 U.S. at 304, and instead indulged in precisely the kind of summary disposition condemned in *Ohio Bell*.

C. The record in this case demonstrates that Chemical Leaman understood the exclusion's restrictive nature even before New Jersey regulators approved it.

DEPE (at 23) is forced to rely upon the contrived "reasonable expectations" of unnamed insurance regulators because insureds like Chemical Leaman understood the potentially restrictive nature of the pollution exclusion. In December 1970, before any pollution exclusion was endorsed onto Chemical Leaman's policies, its insurance broker advised Chemical Leaman's Insurance Committee that there would be no coverage for pollution unless it was "caused by a sudden and accidental release or escape." JA 4248 (Hannold letter).[42] The broker had explained to Chemical Leaman that "sudden" "meant immediate," JA 3894 (Hannold Dep.), not "repetitive in anyway [sic]" or occurring "over a period of time." JA 3899. He further testified that Chemical Leaman understood that the term "accident," as used in the "deceptive" IRB *Explanation*, referred to "a sudden and unexpected event." JA 3893. The Secretary of Chemical Leaman's Insurance Committee recalled the attachment of the pollution-exclusion endorsement as "a rather important change in our insurance." JA 3866-67 (Chase Dep.). Chemical Leaman was thus far from the "typical commercial insured" whose interests the *Morton* court sought to advance. 629 A.2d at 875. Chemical Leaman, like insurance regulators,[43] was keenly aware that the pollution exclusion narrowed the scope of coverage.

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[42] A copy of the pollution exclusion endorsement was appended to the letter. JA 4249. Even earlier, Hannold had advised that "pollution is a hot item these days...and the entire insurance industry is in the process of issuing endorsements in this connection." JA 4251 (Hannold letter). He also forwarded a copy of different exclusion (JA 4253) and insurer's explanation thereof (JA 4252).

[43] *See generally* E. Zampino, R. Cavo & V.C. Harwood, III, "*Morton International:* The Fiction of Regulatory Estoppel," 24 Seton Hall L. Rev. 847 (1993), an article by Aetna counsel.

The regulatory estoppel issue need never be reached here because Aetna should prevail on other grounds. If, however, that issue is reached, the lack of record evidence supporting regulatory estoppel, Chemical Leaman's waiver of the issue below, the record evidence indicating that Chemical Leaman understood the limits of its coverage, and the lack of due process afforded by the *Morton* court all compel the conclusion that applying *Morton*'s "regulatory estoppel" against Aetna would deprive it of millions of dollars without due process.[44] No such decision could fairly be made in the absence of a trial.

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[44] DEPE further claims (at 19) that insurers have no ground to complain because *Morton* partially overruled *Broadwell* in their favor. Yet *Broadwell* was not the law of New Jersey, but only a prediction thereof. Indeed, Judge Brotman felt that *Broadwell's* discussion of the pollution exclusion was mere dicta. Ex. B at 48, *citing Hatco*, 801 F. Supp. at 1352. This Court declined in part of follow *Broadwell*, in *New Castle County*, 933 F.2d at 1203. The Fourth Circuit predicted that Broadwell would be overruled. *See Liberty Mut. Ins. Co. v. Triangle Industries*, 957 F.2d 1153 (4th Cir.), *cert. denied*, 113 S. Ct. 78 (1992).

CONCLUSION

The lower court and jury did not appreciate that under New Jersey law, (1) the pollution exclusion bars coverage for all damages caused by Chemical Leaman's intentional discharge of known pollutants, (2) Chemical Leaman's expectation of some injury prevents it from obtaining coverage, since the actual damage was not empirically improbably, and (3) all the evidence objectively established Chemical Leaman's intent to pollute the environment. For the reasons stated in its briefs and the briefs for the London Market insurers, Aetna respectfully requests that this Court reverse the lower court's judgment and remand with directions to enter judgment in Aetna's favor.

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DATED: June 17, 1994.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-5777

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*,

Defendants-Appellants in No. 93-5777

On appeal from the Final Judgment
of the United States District Court
for the District of New Jersey,
Civ. No. 89-1543 (SSB)

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ARGUMENT

I. *Morton's* Regulatory Equitable Estoppel Doctrine Is Legally Inapplicable To Surplus Lines Insurers Like LMI Who Are Not Authorized To Transact Insurance In New Jersey And Whose Rates Are Not Regulated By The Insurance Department And Therefore The District Court Erred In Granting Summary Judgment In Part To CLTL On The Ground Of The Pollution Exclusion.

As to the 1974-77 LMI policies with the "sudden and accidental" pollution exclusion, CLTL argues that the regulatory estoppel rule from *Morton* applies regardless of the identity of the insurer. CLTL Br. at 55. To place this argument in its deserved perspective, it must be appreciated that the 1974-77 LMI policies initially were underwritten with NMA 1685 pollution exclusions, but CLTL requested and negotiated the deletion of the NMA exclusions and replacement with the "sudden and accidental" pollution exclusion. JA. 12847; 1285; 1; 12877-80. Thus, to argue now for the application of *Morton*'s regulatory estoppel holding to a pollution exclusion clause which CLTL specifically requested in the LMI policies turns logic on its head.

As to the LMI policies with non-standard NMA 1685 pollution exclusions, CLTL contends, without an evidentiary foundation, that "LMI independently misrepresented their NMA 1685 standard form pollution exclusion to state regulators" in Illinois and Kentucky, warranting an extension of *Morton's* regulatory equitable estoppel to all LMI policies. CLTL Br. at 56. *Amicus curiae* State of New Jersey, Department of Environmental Protection and Energy ("NJDEPE") does not go so far to contend that the filings on NMA 1685 pollution exclusion by Certain Lloyds Underwriters with state

insurance regulators in Illinois or Kentucky are material or even relevant to the allegedly misleading filings by the Insurance Rating Board ("IRB") in New Jersey. Instead, the essence of the NJDEPE's position is that any insurer, licensed or unlicensed in New Jersey, which used the "sudden and accidental" pollution exclusion clause, or another pollution-exclusion clause, such as NMA 1685, which "closely parallels" the "sudden and accidental" pollution-exclusion clause, is bound by the IRB filings with the New Jersey Insurance Department, unless the particular insurer establishes both that it did not participate in the misleading filing and did not know about the allegedly misleading filing. NJDEPE Br. at 16-17.

The contentions of CLTL and NJDEPE founder on the same general defect:

While CLTL appreciates that the *legal* linchpin of *Morton's* regulatory estoppel holding is the New Jersey statutory scheme regulating insurance rates, it falsely assumes that New Jersey insurance rate regulation applies to all insurers, authorized as well as unauthorized insurers. The NJDEPE via the Attorney General of the State of New Jersey dives into the foray without threshold consideration or even discussion of whether LMI are governed by the same legal environment of insurance regulation in New Jersey which was the legal predicate for regulatory equitable estoppel in *Morton*. The truth is that *Morton's* regulatory equitable estoppel rule could only be legally applicable to *licensed or authorized* insurers because only authorized insurers are subject to state regulation.

Morton repeatedly noted the connection between the state regulatory authority over rates for insurance coverage and the court's handling of the equitable estoppel issue. 629 A.2d at 851, 853, 872, 873, and 874. *Morton* first broached this connection:

> The Attorney General's *amicus* brief observes that the industry's submission of the pollution-exclusion clause and its approval by the Department of Insurance were specifically required by New Jersey's statutory provisions regulating rates for insurance

> coverage, *N.J.S.A.* 17:29A-1 to -28, although no rate change was sought with respect to the pollution-exclusion clause.

629 A.2d at 851 (emphasis in original). Later, the court observed:

> Our resolution of that issue [of regulatory equitable estoppel] is heavily influenced by our recognition that this state's regulatory review of the pollution-exclusion clause was incidental to the authority of the Commissioner of Insurance to determine the reasonableness of rates for insurance coverage. *N.J.S.A.* 17:29A-1 to -32.

629 A.2d at 872.

N.J.S.A. 17:29A-I(g), however, defines "insurer" to mean an entity or person authorized to transact the business of insurance in New Jersey. Hence, only "authorized" insurers are rate-regulated in New Jersey. Consequently, the New Jersey insurance statutory scheme governing authorized insurers led the Supreme Court of New Jersey to conclude *sua sponte*, in the absence of an evidentiary record on equitable-estoppel issues, that the Insurance Rating Board ("IRB"), as a rating organization acting on behalf of authorized insurers," misled the state's insurance regulatory authority in its review of the [pollution exclusion] clause, and avoided disapproval of the proposed endorsement as well as a reduction in rates." 629 A.2d at 874.

In contrast, the cover notes given to CLTL evidencing the LMI policies stated that:

> The Insurer(s) named above are eligible unlicensed insurers as defined by Pennsylvania Surplus Lines Law, Act. No. 531 effective March 1, 1966. They are neither licensed by nor under the jurisdiction of the Pennsylvania Insurance Department. This coverage has been procured pursuant to the Pennsylvania Surplus Lines Law.

JA.1343, 1357, 1359; *see* 40 Pa. Cons. Stat. § 991.1608 (1994). Traditionally, the surplus lines insurance market is devoted to specialty risks for which an admitted or authorized insurer in a particular state will not underwrite. N.J. Rev. Stat. § 17:22-6.42 (1994); 40 Pa. Cons. Stat. § 991.1604 (1994); *Railroad Roofing & Bldg. Supply Co. v. Financial Fire & Casualty Co.*, 427 A.2d 66, 68, 70 (N.J. 1981); *Industrial Development Assocs. v. Commercial Union Surplus Lines Ins. Co.*, 536 A.2d 787, 790 (N.J. Super. Ct. App. Div. 1988). By definition, the surplus lines law does not supervise the unauthorized and non-admitted surplus lines insurer, but instead regulates the licensed surplus lines agents. *Railroad Roofing*, 427 A.2d at 68 & n.3, 70. There is no requirement under Pennsylvania's or New Jersey's surplus lines law that surplus lines policy forms and clauses must be pre-approved prior to use or that the surplus lines insurance premiums are subject to rate applications or filings before the state insurance department, which explains the absence of evidence that LMI made any representations about the pollution exclusion to New Jersey insurance regulators. In fact, the only New Jersey statute governing the rates of surplus lines insurers mandates that the surplus lines premium cannot be less than the licensed rates to avoid price competition with the licensed insurance market, but there is no ceiling for surplus lines rates. N.J. Rev. Stat. § 17:22-6.43(b). The practical limitations on surplus lines insurance derive from marketplace considerations, such as the capacity in the surplus lines market in a particular year. By design the surplus lines market is largely unregulated to accommodate the special character of the risks involved.

In sum, LMI were and are not members of the IRB or its successor, ISO which represents only authorized insurers in New Jersey. LMIa 4-6, 11-14, 19-21, 26-29; 34-37, 42-45. *Morton's* regulatory equitable estoppel holding (which perforce can only apply to authorized insurers whose rates are regulated) cannot apply to LMI who are not authorized insurers in Pennsylvania or New Jersey. As surplus lines insurers, LMI cannot be legally bound by *Morton's* regulatory estoppel holding. Instead, LMI are entitled to *Morton's* plain-meaning interpretation of the pollution exclusion clauses in their

policies. The district court improperly granted summary judgment to CLTL that the pollution exclusion in the LMI policies lacked a temporal limitation.

Further, contrary to arguments of CLTL and NJDEPE that the NMA 1685 pollution exclusion is not sufficiently distinct from the standard "sudden and accidental" pollution exclusion to warrant disparate treatment from the standard pollution exclusion clause under *Morton,* in *Allied Signal, Inc. v. Abeille-Paix Reassurances, et al*, No. MRS-L-226-88, letter op. (N.J. Super. Ct., Law Div., April 18, 1994) (Stanton, J.) (LMIa 166), a New Jersey court recently granted LMI's motion for summary judgment that *Morton's* regulatory equitable estoppel rule did not apply to NMA 1685 pollution exclusion because of the different wording of the NMA 1685 pollution exclusion. The same outcome should occur here.

Having witnessed the constitutionally improper victimization of the insurers in *Morton* by denying them an opportunity to develop a full factual record on the disputed material fact issues of equitable estoppel, LMI are compelled to respond to the factual half-truths presented in the arguments of CLTL and NJDEPE. Turning to CLTL's suggestion that it was entitled to a surplus lines premium rate reduction because a pollution exclusion appeared in its excess policies starting in April 1, 1971, CLTL Br. at 57-58, this argument not only misleadingly portrays the surplus lines insurance market as a rate regulated market, but misleadingly implies that CLTL was a static organization from 1968 to 1971 with no increase in risk factors and should have received a thereby a lower premium in 1971, rather than a higher premium. The truth is that CLTL paid the same premium for three years with no increase from 1968 to 1971, and that when CLTL requested renewal from LMI for the policy term starting on April 1, 1971, (which is the onset date of the pollution exclusion), the lowest premium quote from LMI was $164,800. LMIa 177. Thus, CLTL did in fact negotiate a reduction in rates because it only paid a total of $142,500 for the 1971 LMI excess coverage. Moreover, CLTL displays a lack of candor in not advising this Court that CLTL was not a static organization from 1968

and 1971 as illustrated by the growth in CLTL's total assets from $47,451,061 in 1968 to $59,288,128 in 1971 (a 25 percent increase) and by the growth in its total operating revenue from $69,389,296 in 1968 to $84,630,106 in 1971 (a 22 percent increase). LMIa 190, 192, 200, 201.

Turning to the LMI filings before the Kentucky and Illinois insurance departments identified in CLTL Br. at 56, these filings reflect that Lloyds Underwriters are only authorized insurers in only two states. LMIa 12, 20, 27, 35-36, 43. Contrary to CLTL's arguments, the LMI filings on the NMA pollution exclusions in Kentucky and Illinois do not rise to the level of representations, must less misrepresentations. *Morton* criticized the IRB's representation to the New Jersey insurance regulators that the pollution exclusion "clarified" existing coverage rather than excluding or subtracting from existing coverage. 629 A.2d at 874-75. No such language equating the NMA pollution exclusions with the "occurrence" definition as a "clarification" appears in the Kentucky and Illinois filings by LMI. Rather, the LMI filings plainly characterize the NMA pollution exclusions as excluding pollution losses (subject to the buy-back exception). Moreover, CLTL's bold accusation that Illinois and Kentucky regulators "'would reasonably have understood' the LMI clause to continue coverage for gradual environmental losses" is based on pure conjecture. To establish a claim of equitable estoppel, it must be shown by clear and convincing evidence among other factual requisites that the party claiming estoppel was unaware of the actual facts. *Horsemen's Benevolent & Protective Ass'n v. Atlantic City Racing Ass'n*, 487 A.2d 707, 712-13 (N.J. 1985); *Miller v. Miller*, 478 A.2d 351, 355 (N.J. 1984). Even assuming *arguendo* that the respective understandings of Illinois and Kentucky insurance regulators about the LMI pollution exclusion filings have relevance to New Jersey state regulators, which LMI deny, there is simply no evidence proffered by CLTL, let alone clear and convincing evidence, that the Kentucky and Illinois state insurance regulators were *in fact misled* by the LMI pollution exclusion filings. Attorney hyperbole and advocacy are insufficient. Moreover, LMI proffer the attached affidavits (LMIa 230-39) from the Kentucky

and Illinois state regulators who were responsible for reviewing those filings which clearly demonstrate the absence of any misunderstanding and that the plain meaning of the NMA pollution exclusions denied coverage for gradual pollution losses.

Besides CLTL's lack of candor, a greater offense is committed by the NJDEPE who failed to disclose to this Court that for almost ten years now the NJDEPE has promulgated regulations, obligating owners or operators of a hazardous waste treatment, storage or disposal facility in New Jersey to maintain liability insurance for two separate risks: "Sudden accidental occurrences" and "non-sudden accidental occurrences," expressly inculcate a temporal limitation on the word "sudden." N.J.A.C. 7:26-9.13(a)-(b). Specifically, the NJDEPE's regulations define "sudden accidental occurrences" to mean "an occurrence which is not continuous or repeated in nature." N.J.A.C. 7:26-9.10(d)(4). The phrase "nonsudden accidental occurrence" is defined by NJDEPE to mean "an occurrence which takes place over time and involves continuous or repeated exposure." N.J.A.C. 7:26-9.10(d)(3). Moreover, the NJDEPE's regulations preface these definitions with the following noteworthy precaution:

> The definitions given below of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

N.J.A.C. 7:26-9.10(d).

In short, as the governmental agency claiming the application of regulatory equitable estoppel, the NJDEPE is an ill-suited intervenor, having full and complete knowledge of the true fact that the term "sudden" in the pollution exclusion places a temporal limitation on the scope of insurance coverage. *See Horsemen's Benevolent & Protective Ass'n,* 487 A.2d at 713. It strains credulity for the NJDEPE to contend that the term "sudden" in the pollution exclusion lacks a temporal limitation based on regulatory equitable estoppel after

promulgating regulations for liability insurance with the "sudden and accidental" pollution exclusion defining the term "sudden" to embrace a temporal quality. Presumptively, the New Jersey Insurance Department, another co-equal limb of same executive branch composed of expert insurance regulators, must have been equally knowledgeable of the restriction in coverage presented by the pollution exclusion to those discharges "that occur abruptly and accidentally." *Morton*, 629 A.2d at 871-872; *See* Edward Zampino et al., *Morton International: The Fiction of Regulatory Estppel*, 24 Seton Hall L. Rev. 847 (1993). Further, the NJDEPE regulatory requirements of sudden and gradual pollution insurance coverages by hazardous waste facility operators and owners deflate the allegation of misleading filings by the IRB since the purchasing public, on notice of the NJDEPE's regulations, knew of the restriction of insurance coverage presented by the qualified pollution exclusion.[2]

II. The Application Of Regulatory Equitable Estoppel To LMI Without An Opportunity To Develop A Full Factual Record Violates LMI's Fundamental Due Process Rights Under The Fifth Amendment.

As a procedural reminder, the issue of regulatory equitable estoppel is being addressed for the first time on appeal. CLTL first asserted regulatory equitable estoppel based on alleged insurer misrepresentations to state insurance regulators before the district court in its reply brief in support of summary judgment on the pollution exclusion. JA. 5568-5614. The district court rejected CLTL's late presentation of this independent ground for summary judgment as untimely. 5/12/93 SJ Opinion at 47 n. 16; *accord W.L. Gore & Assoc. v. C.R.. Bard, Inc.*, 977 F.2d 558, 564 (Fed. Cir. 1992). CLTL never filed a cross appeal. Further, albeit twice requested by LMI,

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[2] The NJDEPE and the Attorney General of the State of New Jersey owe an apology both to LMI and ISO members because the State has falsely presented a claim of regulatory equitable estoppel.

the district court never allowed supplemental proceedings on the important issues derived from the post-judgment decision of *Morton*, including regulatory equitable estoppel. The claim of regulatory equitable estoppel is necessarily fact intensive, requiring a full factual record, by clear and convincing evidence, on the elements of (1) whether LMI or any other insurer in *in fact* proffered misleading filings before New Jersey insurance regulators on the pollution exclusion, including the sub-issue now raised by the *amicus curiae* NJDEPE, that is, whether LMI, which concededly did not proffer any filings with respect to the pollution exclusion before the New Jersey Insurance Department, should be bound vicariously by the filings of other insurers, such as the IRB, absent affirmative proof by LMI of their lack of knowledge of the IRB filings, (2) an unawareness of the true facts by the party seeking estoppel, (3) scienter, that is, an intention or expectation that the misrepresentation will be acted upon by other party, (4) reasonable reliance by the other party, and (5) detriment. *See Horsemen's Benevolent & Protective Ass'n*, 487 A.2d at, 712-13 (N.J. 1985); *Miller*, 478 A.2d at 355; *Eileen T. Quigley,. Inc, v. Miller Family Farms. Inc.*, 629 A.2d 110, 116-117 (N.J. Super. Ct. App. Div. 1993).

LMI respectfully contend that the *Morton* doctrine of regulatory equitable estoppel cannot *legally* apply to LMI, but LMI nevertheless suggest that if this Court concludes otherwise, it is imprudent for this Court to engage in *de novo* appellate fact-finding without a developed evidentiary record on the claim of equitable estoppel against LMI. *Simmons v. Southern Bell Tel, & Tel, Co.*, 940 F.2d 614, 617-18 (llth Cir. 1991) (equitable estoppel claim raised for first time on appeal remanded to district court for a full hearing); *Texaco v. Ponsoldt,* 939 F.2d 794, 801 (9th Cir. 1991); *Palatine I v. Planning Bd.*, 628 A.2d 321, 340 (N.J. 1993) (Stein, I., dissenting); *Harr v. Allstate Ins, Co.*, 255 A. 2d 208, 212, 219-21 (N.J. 1969).

Moreover, LMI respectfully contend that the imposition of regulatory equitable estoppel against LMI without a properly developed factual record would violate their fundamental

entitlement to due process under the law. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937). In *Morton*, the policyholder did not assert regulatory equitable estoppel either before trial court or the New Jersey Superior Court, Appellate Division. Therefore, there was no discovery, no evidentiary hearing, and no findings of fact on the factual requirements of equitable estoppel prior to *Morton's sua sponte* invocation of that doctrine. Although requested by the carriers in *Morton*, the supreme court expressly refused to remand the case for consideration of factual issues material to the regulatory equitable estoppel issue, observing that such remand would be "redundant" and relying instead on non-evidentiary case reports from other jurisdictions, fragmentary regulatory history, and journal articles by interested commentators to predicate its holding. *Morton*, 629 A.2d at 848. The carrier defendants in *Morton* have now sought review by petition for certiorari before the United States Supreme Court over the denial of due process. *Insurance Company of North America v. Morton International, Inc.*, 629 A.2d 831 (N.J. 1993), *petition for cert.*, (U.S. May 31, 1994) (No. 93-1797). Hence, LMI respectfully suggest that application of *Morton's* regulatory estoppel rule to them in the case *sub judice* would constitute a denial of fundamental due process. Consequently, LMI respectfully request that this Court remand the claim of regulatory equitable estoppel to the district court for a plenary hearing in the event that serious consideration must be given to this issue.

III. Assuming *Arguendo* That *Morton's* Regulatory Equitable Estoppel Rule Mutates The Plain Meaning Of The Pollution Exclusion In The LMI Excess Policies, The Pollution Exclusion Still Bars Insurance Coverage For Groundwater Pollution And The District Court Erred In Denying Judgment To LMI, Or Alternatively, A New Trial On "This Ground."

A. The Insurers Adequately Preserved This Issue For Appeal.

Besides requesting summary judgment, albeit unsuccessfully on the pollution exclusion, LMI informed the district court of their legal position on the requirements of nonaccidental discharges, or alternatively, unexpected or unintended discharges under the NMA 1685 pollution exclusion, in the Joint Trial Brief (JA.9227, 9232-34 & n. 117-18), the carriers' joint special verdict form (JA.9316), the carriers' proposed joint jury charges (JA.9365), the carriers' joint FRCP 50(a) motion (JA. 11395), the carriers' objections to the jury charge (JA. 11693-94), and the carriers' FRCP 50(b) motion (JA. 14534-43)). Further, as to CLTL's argument of waiver in light of the lack of objection immediately to the midtrial jury instruction, under Fed. R. Civ. P. ("FRCP") 51, the time for objecting to a jury charge is "before the jury retires to consider its verdict." Therefore, the insurers timely objected to all jury charges requesting the jury to rule on whether CLTL intended or expected the ultimate destination of its polluting discharges when they objected before the jury retired. *See* JA. 11600. Contrary to CLTL's specious argument, there is no technical requirement obligating the carriers to object to the mid-trial jury instruction given prior to Mr. Elston's cross-examination during CLTL's case in chief. Moreover, the lack of objection to the substance of the mid-trial jury instruction is understandable in light of the context of that instruction whose genesis came from the district court, less than one week after the district court granted partial summary judgment to CLTL on the scope of the pollution exclusion in the

carriers' policies, "to give this case to the jury in a fair manner and in an impartial manner so they can understand it and reach their conclusion." JA.9914. Further, as to CLTL's contention about the insufficiency of the insurers' objection to the jury charge on the pollution exclusion to preserve the issue for appeal, this Court only requires that the "objection ... adequately put the court on notice of the issue [the insurers] now raise." *Dunn v. Hovic*, I F.3d 1371, 1379 (3d Cir. 1993) (en banc). The insurers' objection met this standard.

B. CLTL's Established Intention To Discharge Known Pollutants into the Unlined Seepage Ponds Is Sufficient To Defeat Insurance Coverage Under The Pollution Exclusion, Regardless Of CLTL's Scienter To Cause Any Resulting Property Damage.

Cognizant that *Morton's* regulatory estoppel brand of the pollution exclusion is still a silver bullet to its claim for insurance coverage, CLTL conjures two sophistic arguments to avoid defeat. First, CLTL argues against common sense that its routine and daily "transfer of rinsewater to its treatment ponds and lagoons" was not a "discharge" of pollutants to the environment, but a passage of rinsewater into a state of containment in the unlined seepage ponds. CLTL Br. at 63-64, 67. This argument passes the boundary of credible advocacy. The notion that an unlined seepage lagoon is a containment vessel is a contradiction in terms. It also challenges without a formal cross appeal the district court's finding as a matter of law that CLTL had intended the lagoon contents to percolate and seep into the underlying soil. FRCP 56(d) Order Para. 19; JA.9696-97. If CLTL truly intended its unlined seepage lagoons to "confine" the rinsewater, then why did CLTL append a discharge pipe on the last lagoon into the adjacent swamp? More simply, if the unlined seepage ponds were intended as confinement vessels, why weren't they lined at the outset to prevent seepage or percolation? Moreover, CLTL's revisionist characterization of its unlined seepage lagoons as in *pari materia* to licensed landfills is not based on any proof

at trial and surely is at odds with the unlicensed nature of CLTL's alleged waste treatment lagoons at Bridgeport.

Second, CLTL's contention that the only relevant "discharge" for purposes of the pollution exclusion is the "discharge causing the very property damage at issue" is fundamentally flawed. *Morton* has already resolved that for purposes of the pollution exclusion, "the phrase 'sudden and accidental' does not characterize or relate to the *damage* caused by the pollution." *Morton*, 629 A.2d 847.

BROKERS COPY

No. C71-03-03-13B

PREVIOUS NO. 68P 2-116B

CHEMICAL LEAMAN TANK LINES INC. ET AL
AS PER ENDORSEMENT NO. 1 ATTACHED
500 E. LANCASTER AVENUE
DOWNINGTON, PENNSYLVANIA

TO THE ASSURED:

We are in receipt of a written binder/cover note, the original of which is retained in our office and may be inspected during regular business hours, evidencing that insurance coverage requested by you and described below has been assumed by: Companies

Term: April 1, 1971 to April 1, 1974 both days at 12:01 A.M., at the address of the Named Assured

The Insurer(s) named above are eligible unlicensed insurers as defined by Pennsylvania Surplus Lines Law, Act No. 531 effective March 1, 1966. They are neither licensed by nor under the jurisdiction of the Pennsylvania Insurance Department. This coverage has been procured pursuant to the Pennsylvania Surplus Lines Law.

DESCRIPTION OF COVERAGE

Coverage:	Umbrella Liability as per form
Limits:	As per form
Premium:	$27,000. part of $30,000
State Tax:	$810.00 (Pennsylvania)
Hereon:	30.19% part of 90% part of 100%
Security:	See Endorsement No 2 attached

Subject to the same terms, limitations and conditions as now contained on or are hereinafter endorsed on Lloyd's Cover Note L71-03-03-13B

NMA 1546

Joint Appendix Exhibit JA 1343

(SUBJECT TO TERMS AND CONDITIONS OF THE POLICY TO BE ISSUED)

A policy of insurance will be issued by above named insurer(s) and delivered to you in due course of business. When the policy is received by you, this notice shall become null and void.

This insurance may be cancelled as provided in the wording of the policy, and if there is no wording attached as to cancellation, on 30 days notice by either the Assured or the Insurer(s) through Stewart, Smith (Pennsylvania) Inc. as intermediary. Notice of cancellation shall be deemed given by the Insurer(s) when given by Stewart, Smith (Pennsylvania) Inc. to the Assured or its representative and shall be deemed given to the Insurer(s) when given to Stewart, Smith (Pennsylvania) Inc. by the Assured or its representative. In the event of cancellation of this insurance, the Insurer(s) shall be entitled to the premium earned on a short rate basis if cancelled by the Assured and pro rata basis if cancelled by the Insurer(s).

DATED AT PHILADELPHIA, PENNA.

May 18, 1971

STEWART, SMITH (PENNSYLVANIA) INC.
Surplus Lines Agent
Public Ledger Building
Philadelphia, Pennsylvania

By .....

Title Executive Vice President

BROKERS COPY **No.** L71-03-03-13B

PREVIOUS NO. 68P 2-116B

CHEMICAL LEAMAN TANK LINES INC. ET AL
AS PER ENDORSEMENT NO. 1 ATTACHED
500 E. LANCASTER AVENUE
DOWNINGTON, PENNSYLVANIA

TO THE ASSURED:

We are in receipt of a written binder/cover note, the original of which is retained in our office and may be inspected during regular business hours, evidencing that insurance coverage requested by you and described below has been assumed by: Lloyd's Underwriters

Term: April 1, 1971 to April 1, 1974 both days at 12:01 A.M., at the address of the Named Assured

The Insurer(s) named above are eligible unlicensed insurers as defined by Pennsylvania Surplus Lines Law, Act No. 531 effective March 1, 1966. They are neither licensed by nor under the jurisdiction of the Pennsylvania Insurance Department. This coverage has been procured pursuant to the Pennsylvania Surplus Lines Law.

DESCRIPTION OF COVERAGE

Coverage: Umbrella Liability as per form attached

Limits: As per form attached

Premium: $27,000. part of $30,000

Hereon: 59.81% part of 90% part of 100%

Security: Lloyd's Underwriters

State Tax: $810.00 (Pennsylvania)

Excess Umbrella Wording, NMA 1256, NMA 1685, NMA 772

(SUBJECT TO TERMS AND CONDITIONS OF THE POLICY TO BE ISSUED)

A policy of insurance will be issued by above named insurer(s) and delivered to you in due course of business. When the policy is received by you, this notice shall become null and void.

This insurance may be cancelled as provided in the wording of the policy, and if there is no wording attached as to cancellation, on 30 days notice by either the Assured or the Insurer(s) through Stewart, Smith (Pennsylvania) Inc. as intermediary. Notice of cancellation shall be deemed given by the Insurer(s) when given by Stewart, Smith (Pennsylvania) Inc. to the Assured or its representative and shall be deemed given to the Insurer(s) when given to Stewart, Smith (Pennsylvania) Inc. by the Assured or its representative. In the event of cancellation of this insurance, the Insurer(s) shall be entitled to the premium earned on a short rate basis if cancelled by the Assured and pro rata basis if cancelled by the Insurer(s).

DATED AT PHILADELPHIA, PENNA.

May 18, 1971

STEWART, SMITH (PENNSYLVANIA) INC.
Surplus Lines Agent
Public Ledger Building
Philadelphia, Pennsylvania

By .....

Title Executive Vice President

COPY

No. C 68P 2-116

Joint Appendix 1359

PREVIOUS NO. C 65P 5-119

CHEMICAL LEAMAN TANK LINES INC., et al
As per Endorsement No. 1 attached
Downington, Pennsylvania

TO THE ASSURED:

We are in receipt of a written binder/cover note, the original of which is retained in our office and may be inspected during regular business hours, evidencing that insurance coverage requested by you and described below has been assumed by: Companies

Term: April 1st, 1968 to April 1st, 1971 both days at 12:01 A.M., at the address of the Named Assured

The Insurer(s) named above are eligible unlicensed insurers as defined by Pennsylvania Surplus Lines Law, Act No. 531 effective March 1, 1966. They are neither licensed by nor under the jurisdiction of the Pennsylvania Insurance Department. This coverage has been procured pursuant to the Pennsylvania Surplus Lines Law.

DESCRIPTION OF COVERAGE

Umbrella Liability, as per form attached to L 68P 2-116

Limit: As per form attached to L 68P 2-116

Hereon: 47.63%

Premium: $30,000.00

State Tax: $900.00 (Pennsylvania)

Security:

14.22%	NATIONAL CASUALTY CO.*
14.22%	DOMINION INS.CO. LTD.
7.11%	EXCESS INS.CO. LTD.
4.74%	MINSTER INS.CO. LTD.

3.55% WORLD AUXILIARY INS.CO. LTD.
3.79% TUREGUM INS.CO. LTD.*
Subject to the same terms, limitations and conditions as now contained on or are hereinafter endorsed on Lloyd's Cover Note No. L 68P 2-116

(SUBJECT TO TERMS AND CONDITIONS OF THE POLICY TO BE ISSUED)

A policy of insurance will be issued by above named insurer(s) and delivered to you in due course of business. When the policy is received by you, this notice shall become null and void.

This insurance may be cancelled as provided in the wording of the policy, and if there is no wording attached as to cancellation, on 30 days notice by either the Assured or the Insurer(s) through Stewart, Smith (Pennsylvania) Inc. as intermediary. Notice of cancellation shall be deemed given by the Insurer(s) when given by Stewart, Smith (Pennsylvania) Inc. to the Assured or its representative and shall be deemed given to the Insurer(s) when given to Stewart, Smith (Pennsylvania) Inc. by the Assured or its representative. In the event of cancellation of this insurance, the Insurer(s) shall be entitled to the premium earned on a short rate basis if cancelled by the Assured and pro rata basis if cancelled by the Insurer(s).

DATED AT PHILADELPHIA, PENNA.

May 23rd, 1968

STEWART, SMITH (PENNSYLVANIA) INC.
Surplus Lines Agent
Public Ledger Building
Philadelphia, Pennsylvania

By .....

Title Executive Vice President

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

RECEIVED
APR -8 1994
U.S.C.A. 3rd. CIR.

NOS. 93-5777, 93-5794

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellants,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant in No. 93-5794

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, ET AL.,

Defendants-Appellants in No. 93-5777

On appeal from the Final Judgment
of the United States District Court
for the District of New Jersey,
Civ. No. 89-1543 (SSB)

LONDON MARKET INSURERS' SUPPLEMENTAL APPENDIX

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CHEMICAL LEAMAN TANK LINES, INC., v. THE AETNA CAS. & SUR. CO., ET AL

DOCKET NOS. 93-5777, 93-5794

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the ground of lack of relevancy. Syndicate 618 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 618 respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 618 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Neither Syndicate 618 nor the Lloyds' Underwriters' Non-Marine Association has submitted documents to the New Jersey Insurance Commissioner on the pollution exclusion.

Syndicate 618 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

16. State whether you or any insurance trade organization or association to which you belong (including Lloyd's Underwriters' Fire and Non-Marine Association) ever submitted documents to any state (other than New Jersey) insurance department, commission, board or agency, concerning the polluter's exclusion or Standard ISO polluter's exclusion. If so,

(a) identify each such document;

(b) identify to whom each such document was submitted, and when;

(c) identify who was involved in making each such submission; and

(d) identify who was involved in drafting each such document.

Response No. 16 (a)-(d):

Syndicate 618 object to the phrase "commission, board or agency" as unduly vague and ambiguous. Moreover, Syndicate 618 specially object to this interrogatory on the ground of

lack of relevancy. Syndicate 618 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 618 respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 618 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Upon information and belief, the Lloyds' Underwriters' Non-Marine Association has not submitted documents to any state insurance commissioner on the pollution exclusion.

The Lloyds' Underwriters Attorney-In-Fact Offices in Illinois and Kentucky, which are the only two states where Lloyds' Underwriters are admitted to underwrite insurance coverage, have submitted documents about the pollution exclusion to the insurance commissioners of Illinois and Kentucky. Pursuant to FRCP 33(c), Syndicate 618 will produce responsive documents.

Syndicate 618 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Neither Syndicate 604 nor the Lloyds' Underwriters' Non-Marine Association has submitted documents to the New Jersey Insurance Commissioner on the pollution exclusion.

Syndicate 604 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

16. State whether you or any insurance trade organization or association to which you belong (including Lloyd's Underwriters' Fire and Non-Marine Association) ever submitted documents to any state (other than New Jersey) insurance department, commission, board or agency, concerning the polluter's exclusion or Standard ISO polluter's exclusion. If so,

(a) identify each such document;

(b) identify to whom each such document was submitted, and when;

(c) identify who was involved in making each such submission; and

(d) identify who was involved in drafting each such document.

Response No. 16 (a)-(d):

Syndicate 604 object to the phrase "commission, board or agency" as unduly vague and ambiguous. Moreover, Syndicate 604 specially object to this interrogatory on the ground of lack of relevancy. Further, Syndicate 604 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion and legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 604 respond that they are not members, of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 604 have belonged to the Lloyd's

Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Upon information and belief, the Lloyds' Underwriters' Non-Marine Association has not submitted documents to any state insurance commissioner on the pollution exclusion.

The Lloyds' Underwriters Attorney-In-Fact Offices in Illinois and Kentucky, which are the only two states where Lloyds' Underwriters are admitted to underwrite insurance coverage, have submitted documents about the pollution exclusion to the insurance commissioners of Illinois and Kentucky. Pursuant to FRCP 33(c), Syndicate 604 will produce responsive documents.

Syndicate 604 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

17. Do you contend that the form of so-called polluter's exclusion or endorsement in any of the policies sold by you to Chemical Leaman was approved by any state insurance department, commissioner or board? If so, as to each such state, state by whom the approval was given, the date the approval was given, to whom the approval was given, and identify all documents reflecting and/or relating to the approval.

Response No. 17:

Syndicate 604 specially object to this interrogatory on the ground that it seeks nonrelevant information. Further, Syndicate 604 specially object to the phrase "polluter's exclusion

the ground of lack of relevancy. Syndicate 219 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 219 respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 219 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Neither Syndicate 219 nor the Lloyds' Underwriters' Non-Marine Association has submitted documents to the New Jersey Insurance Commissioner on the pollution exclusion.

Syndicate 219 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

16. State whether you or any insurance trade organization or association to which you belong (including Lloyd's Underwriters' Fire and Non-Marine Association) ever submitted documents to any state (other than New Jersey) insurance department, commission, board or agency, concerning the polluter's exclusion or Standard ISO polluter's exclusion. If so,

(a) identify each such document;

(b) identify to whom each such document was submitted, and when;

(c) identify who was involved in making each such submission; and

(d) identify who was involved in drafting each such document.

Response No. 16 (a)-(d):

Syndicate 219 object to the phrase "commission, board or agency" as unduly vague and ambiguous. Moreover, Syndicate 219 specially object to this interrogatory on the ground of lack of relevancy. Syndicate 219 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 219 respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 219 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Neither Syndicate 219 nor the Lloyds' Underwriters' Non-Marine Association has submitted documents to the New Jersey Insurance commissioner on the pollution exclusion.

The Lloyds' Underwriters Attorney-In-Fact Offices in Illinois and Kentucky, which are the only two states where Lloyds' Underwriters are admitted to underwrite insurance coverage, have submitted documents about the pollution exclusion to the insurance commissioners of Illinois and Kentucky. Pursuant to FRCP 33(c), Syndicate 219 will produce responsive documents.

Syndicate 219 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

(c) identify who was involved in making each such submission; and

(d) identify who was involved in drafting each such document.

Response No. 15 (a)-(d):

Syndicate 90 specially object to the phrase "New Jersey... commission, board or agency" as unduly vague and ambiguous. Moreover, Syndicate 90 specially object to this interrogatory on the ground of lack of relevancy. Syndicate 90 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 90 respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 90 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Neither Syndicate 90 nor the Lloyds' Underwriters' Non-Marine Association has submitted documents to the New Jersey Insurance Commissioner on the pollution exclusion.

Syndicate 90 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

16. State whether you or any insurance trade organization or association to which you belong (including Lloyd's Underwriters' Fire and Non-Marine Association) ever submitted documents to any state (other than New Jersey) insurance department, commission, board or agency, concerning the polluter's exclusion or Standard ISO polluter's exclusion. If so,

(a) identify each such document;

(b) identify to whom each such document was submitted, and when;

(c) identify who was involved in making each such submission; and

(d) identify who was involved in drafting each such document.

Response No. 16 (a)-(d):

Syndicate 90 object to the phrase "commission, board or agency" as unduly vague and ambiguous. Moreover, Syndicate 90 specially object to this interrogatory on the ground of lack of relevancy. Syndicate 90 specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Syndicate 90 respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicate 90 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters', Fire and Non-Marine Association. Upon information and belief, the Lloyds' Underwriters' Non-Marine Association has not submitted documents to any state insurance commissioner on the pollution exclusion.

The Lloyds' Underwriters Attorney-In-Fact offices in Illinois and Kentucky, which are the only two states where Lloyds' Underwriters are admitted to underwrite insurance coverage, have submitted documents about the pollution exclusion to the insurance commissioners of Illinois and Kentucky. Pursuant to FRCP 33(c), Syndicate 90 will produce responsive documents.

Syndicate 90 are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

17. Do you contend that the form of so-called polluter's exclusion or endorsement in any of the policies sold by you to Chemical Leaman was approved by any state insurance department, commissioner or board? If so, as to each such state,

state by whom the approval was given, the date the approval was given, to whom the approval was given, and identify all documents reflecting and/or relating to the approval.

Response No. 17:

Syndicate 90 specially object to this interrogatory, on the grounds that it seeks nonrelevant information and that the phrase "polluter's exclusion or endorsement" calls for a legal-conclusion and interpretation. Subject to and without waiving the foregoing special and general objections, Syndicate 90 respond that it was not necessary to obtain the approval of any state insurance commissioner in order for the pollution exclusion to appear in the policies to which Syndicate 90 subscribed and which were issued to plaintiff.

18. Have you or any of your representatives ever stated that the Standard ISO polluter's exclusion or the polluter's exclusion was a clarification of existing coverage or a clarification of the "occurrence" definition? If so, identify each such statement.

on the ground of lack of relevancy. Merrett Syndicates specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Merrett Syndicates respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicates 417, 772, 795 and 797 have belonged to the Lloyd's Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Neither Merrett Syndicates nor the Lloyds' Underwriters' Non-Marine Association has submitted documents to the New Jersey Insurance Commissioner on the pollution exclusion.

Merrett Syndicates are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO pollution exclusion is not applicable to these defendants.

16. State whether you or any insurance trade organization or association to which you belong (including Lloyd's Underwriters' Fire and Non-Marine Association) ever submitted documents to any state (other than New Jersey) insurance department, commission, board or agency, concerning the polluter's exclusion or Standard ISO polluter's exclusion. If so,

(a) identify each such document;

(b) identify to whom each such document was submitted, and when;

(c) identify who was involved in making each such submission; and

(d) identify who was involved in drafting each such document.

Response No. 16 (a)-(d):

Merrett Syndicates object to the phrase "commission, board or agency" as unduly vague and ambiguous. Moreover, Mer-

rett Syndicates specially object to this interrogatory on the ground of lack of relevancy. Merrett Syndicates specially object to the phrase "polluter's exclusion or Standard ISO polluter's exclusion" as calling for a legal conclusion or legal interpretation.

Subject to and without waiving the foregoing special and general objections, Merrett Syndicates respond that they are not members of any insurance trade organization or association as commonly defined. In the past, the active non-marine underwriters for Syndicates 417, 772, 795 and 797 have belonged to the Lloyds' Underwriters' Non-Marine Association or its predecessor, Lloyd's Underwriters' Fire and Non-Marine Association. Upon information and belief, the Lloyds' Underwriters' Non-Marine Association has not submitted documents to any state insurance commissioner on the pollution exclusion.

The Lloyds' Underwriters Attorney-In-Fact Offices in Illinois and Kentucky, which are the only two states where Lloyds' Underwriters are admitted to underwrite insurance coverage, have submitted documents about the pollution exclusion to the insurance commissioners of Illinois and Kentucky. Pursuant to FRCP 33(c), Merrett Syndicates have produced responsive documents.

Merrett Syndicates are not members of the Insurance Services Office (ISO); therefore, the inquiry about the ISO Pollution exclusion is not applicable to these defendants.

17. Do you contend that the form of so-called polluter's exclusion or endorsement in any of the policies sold by you to Chemical Leaman was approved by any state insurance department, commissioner or board? If so, as to each such state, state by whom the approval was given, the date the approval was given, to whom the approval was given, and identify all documents reflecting, and/or relating to the approval.

Response No. 17:

Merrett Syndicates specially object to this interrogatory on the ground that it seeks nonrelevant information. Subject to

and without waiving the foregoing special and general objections, Merrett Syndicates respond that it was not necessary to obtain the approval of any state insurance commissioner in order for the pollution exclusion to appear in the policies to which Merrett Syndicates subscribed and which were issued to plaintiff. Further, Merrett Syndicates specially object to the phrase "polluter's exclusion or endorsement" as calling for a legal conclusion or legal interpretation.

18. Have you or any of your representatives ever stated that the Standard ISO polluter's exclusion or the polluter's exclusion was a clarification of existing coverage or a clarification of the "occurrence" definition? If so, identify each such statement.

Response No. 18:

Merrett Syndicates object to this interrogatory on grounds of lack of relevancy, that it calls for a legal conclusion or interpretation to a non-existent factual circumstance, and that

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5777

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, ET AL.,

Defendants-Appellants in No. 93-5777

On appeal from the Final Judgment of the United States District Court for the District of New Jersey,

Civ. No. 89-1543 (SSB)

LONDON MARKET INSURERS' SUPPLEMENTAL APPENDIX VOLUME II

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CHEMICAL LEAMAN TANK LINES, INC., v. THE AETNA CAS. & SUR. CO., ET AL.

DOCKET NOS. 93-5777, 93-5794

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Consolidated Balance Sheet December 31, 1971 and 1970

Assets	1971	1970
Current assets		
Cash	$ 6,678,105	$ 5,552,873
Accounts receivable		
Customers	5,022,138	4,946,455
Others	2,911,048	942,611
Materials and supplies, at cost	1,183,873	1,170,957
Prepaid expense		
Tires and hoses in service	1,956,182	2,027,419
Licenses, insurance and other	672,928	662,911
Total current assets	18,424,274	15,303,226
Investments and advances	974,183	716,216
Property, plant and equipment, at cost		
Land	2,297,281	2,173,892
Structures and improvements	6,439,914	6,038,432
Revenue equipment	52,805,470	56,628,955
Other carrier operating property	2,345,724	1,995,690
	63,888,389	66,836,969

Accumulated depreciation and amortization	28,772,668	30,678,124
	35,115,721	36,158,845
Intangible property	4,685,774	4,651,289
Deferred charges and other assets	88,176	437,832
Totals	$59,288,128	$57,267,408

The accompanying notes are an integral part of these financial statements

Statement of Consolidated Earnings

Years Ended December 31

	1971	1970	1969	1968	1967
Operating revenue	$84,630,106	$79,734,828	$76,439,011	$69,389,296	$59,445,879
Operating expense					
Equipment maintenance	13,391,434	12,807,692	11,203,789	9,921,574	8,341,178
Transportation	48,776,407	45,127,593	42,708,094	39,278,241	35,594,013
Traffic	532,046	629,474	579,542	548,142	461,126
Insurance and safety	2,744,151	2,678,998	2,535,788	2,226,666	1,982,917
Administrative and general	3,317,823	3,116,256	2,840,507	2,505,311	2,315,696
Depreciation	6,704,937	7,778,508	6,966,556	5,510,124	5,071,743
Operating taxes and licenses	4,989,022	5,146,309	5,054,566	4,642,920	3,774,304
Total operating expense	80,455,820	77,284,830	71,888,842	64,632,978	57,540,977
Operating income	4,174,286	2,449,998	4,550,169	4,756,318	1,904,902
Other deductions (additions), net					
Interest	2,019,604	2,327,180	1,954,039	1,481,993	1,312,923
Miscellaneous	63,471	(24,186)	204,765	321,672	386,368
	2,083,075	2,302,994	2,158,804	1,803,665	1,699,291
	(illegible)	(illegible)	12.24	12.20	(illegible)

Earnings before federal taxes on income	2,091,211	147,004	2,391,365	2,952,653	205,611
Federal income taxes					
Current	555,215	70,296	554,158	693,754	(458,694)
Deferred	223,586	(113,988)	210,543	284,628	378,124
	778,801	(43,692)	764,701	978,382	(80,570)
Net earnings	$ 1,312,410	$ 190,696	$ 1,626,664	$ 1,974,271	$ 286,181
Earnings per share (weighted average shares outstanding)	$1.01	$.15	$1.30	$1.60	$.26

The accompanying notes are an integral part of these financial statements

Statement of Consolidated Retained Earnings

Years Ended December 31, 1971 and 1970

	1971	1970
Balance, beginning of each year	$8,529,860	$8,861,385
Net earnings for each year	1,312,410	190,696
	9,842,270	9,052,081
Cash dividends, common stock (50¢ and 40¢)	644,656	522,221
Balance, end of each year	$9,197,614	$8,529,860

The accompanying notes are an integral part of these financial statements.

Consolidated Balance Sheet at December 31, 1969 and 1968

Assets

	1969	1968*
Current assets		
Cash	$ 5,775,473	$ 6,071,234
Accounts receivable		
Customers	5,342,404	5,305,209
Others	798,507	642,221
	6,140,911	5,947,430
Materials and supplies, at cost	1,042,988	858,242
Prepaid expense		
Tires and hoses in service	2,056,021	1,490,547
Licenses, insurance and other	549,750	499,758
Total current assets	2,605,771	1,990,305
	15,565,143	14,867,211
Investments, at cost	106,024	88,538

Property, plant and equipment, at cost		
Land	1,278,671	817,149
Structures and improvements	4,891,001	3,679,334
Revenue equipment	54,328,921	43,814,338
Other carrier operating property	1,910,892	1,011,314
	62,409,485	49,322,135
Accumulated depreciation and amortization	25,391,217	18,032,134
	37,018,268	31,290,001
Intangible property	4,295,519	659,481
Deferred charges and other assets	1,212,786	545,830
Totals	$58,197,740	$47,451,061

*Reclassified for purposes of comparison.

The accompanying notes are an integral part of these financial statements.

Liabilities

	1969	1968
Current liabilities		
Notes payable, bank (unsecured)	$ '300,000	$ 100,000
Accounts payable and accruals	4,038,677	5,212,990
Accrued income taxes	572,063	1,148,244
Estimated cargo loss, liability and damage claims	851,817	462,953
Current liabilities before current maturities of long-term debt	5,762,557	6,924,187
Current maturities of long-term debt	7,196,286	5,708,122
Total current liabilities	12,958,843	12,632,309
Long-term debt, net of current maturities	23,981,312	20,673,293
Deferred income tax	3,444,679	2,934,513

Stockholders' equity		
Common stock, voting, par value $2.50 per share; authorized 1,500,000 shares; outstanding 1969—1,287,525 shares, 1968—954,192 shares	3,218,812	2,385,480
Capital surplus	5,732,709	1,066,045
Retained earnings	8,861,385	7,759,421
	17,812,906	11,210,946
Totals	$58,197,740	$47,451,061

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-5777, 93-5794

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant in No. 93-5794

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*

Defendants-Appellants in No. 93-5777

On appeal from the Final Judgment
of the United States District Court
for the District of New Jersey,
Civ. No. 89-1543 (SSB)

BRIEF FOR APPELLANTS ROBIN ANTHONY GILDART JACKSON, AN UNDERWRITER AT LLOYD'S, AND CERTAIN LONDON MARKET INSURANCE COMPANIES

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Dated: April 7, 1994

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STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. There are no known related proceedings.

ARGUMENT

I. The District Court Erroneously Held On Summary Judgment And Instructed The Jury That CLTL Did Not Have The Burden To Prove That The Pollution Arose Out Of Abrupt, Unintentional, and Unexpected Discharges Of Pollutants Into Unlined Seepage Ponds And Lagoons.

On cross-motions for summary judgment, the district court rejected LMI's arguments that the pollution exclusion incorporated a temporal element by the word "sudden" and that CLTL had the burden of proving any exception to the exclusion which restores coverage. 3/12/93 Op. at 49. At trial, against LMI's objections, the jury was instructed that the carriers could avoid coverage under the pollution exclusion only if they proved that CLTL expected or intended to discharge contaminants into the wetlands and groundwater at the Bridgeport Terminal. JA.14461. The jury found that CLTL expected and intended discharges into the swamp, but not into the groundwater. JA.14429-31. On appeal, the sole issue concerning the pollution exclusion therefore is whether it bars insurance coverage for groundwater contamination.

A. The District Court Erroneously Interpreted And Instructed The Jury That The Pollution Exclusion In The LMI Excess Policies Did Not Include A Temporal Element.

After trial and while the post-trial motions were pending, the New Jersey Supreme Court decided *Morton Int'l v. General Accident Ins. Co. of Am.*, 134 N.J. 1, 629 A.2d 831 (1993) ("*Morton*"), which explained the plain meaning of the so-called "ISO" pollution exclusion with the "sudden and accidental" exception as follows:

> As is evident from the text of the standard clause, the phrase "sudden and accidental" does not characterize or relate to the *damage* caused by pollution but instead narrowly limits the kind of "discharge, dispersal, release or escape" of pollutants for which coverage is provided.... [W]e are persuaded that "sudden" possesses a temporal element, generally connoting an event that begins abruptly or without prior notice or warning, ... The meaning of the term "accidental" being generally understood, we discern that the phrase "sudden and accidental" in the standard pollution-exclusion clause describes only those discharges, dispersals, releases, and escapes of

> pollutants that occur abruptly or unexpectedly and are unintended.

629 A.2d at 847 (emphasis in original). However, *Morton* held that "notwithstanding the literal terms of the standard pollution-exclusion clause,.... the clause will be interpreted to preclude coverage in cases in which the *insured* intentionally discharges a known pollutant, irrespective of whether the resulting property damage was intended or expected." 629 A. 2d at 875. The court determined that insurers affiliated with the Mutual Insurance Rating Bureau (MIRB) and the Insurance Rating Board (IRB), both successors to the Insurance Services Office (ISO), had allegedly misrepresented the meaning of the pollution exclusion to obtain regulatory approval from the New Jersey Insurance Commissioner, and therefore would be estopped from relying upon the plain and literal meaning of the pollution exclusion. 629 A.2d at 872-76.

But, *Morton*, recognizing that "some of the excess carriers had issued policies with non-standard pollution-exclusion clauses," expressly exempted non-standard pollution exclusion clauses from its regulatory estoppel holding. 629 A.2d at 847. Among those carriers in *Morton* with non-standard pollution exclusion clauses were Certain London Market Insurers. 629 A.2d at 837-38. In carving out an exemption, *Morton* simply recognized that only the "sudden and accidental" form of the pollution exclusion had been submitted for regulatory approval to the New Jersey Insurance Department by domestic carriers or their service organizations.

On two occasions LMI informed the district court of *Morton* and its impact in the case *sub judice*. JA. 16677, 16700. The district court never responded to LMI's suggestion for supplemental briefing on *Morton* and was silent on *Morton* in its post-trial rulings. The task of assessing the effect of *Morton* devolves upon this Court. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) (In diversity cases, until the matter is no longer *sub judice*, federal courts are bound to apply the state law as it exists at the time of the appeal.);

Seese v. Volkswagenwerk, A.G., 679 F.2d 336, 337 (3d Cir. 1982).

As to *Morton*'s effect upon the LMI policies, LMI begin with the obvious. LMI were not members of the IRB, MIRB, or ISO. Thus, as respects LMI, the essential requirement of improper conduct in the first instance for the application of equitable estoppel is plainly missing. Even the State of New Jersey, which appeared as an *amicus curiae*, arguing for regulatory estoppel, in *Morton*, appreciated as much. It informed the New Jersey Supreme Court that it "took no position with respect to insurers who did not participate in any way in the misleading filing with the Department of Insurance." Brief of *Amicus Curiae* State of New Jersey at 28, *Morton* (LMI Supplemental Appendix at 79) (hereafter "LMIa_") . Thus, the State of New Jersey would not disagree with the position of LMI.

A leap of faith is not necessary for this Court to hold that the New Jersey Supreme Court would not apply *Morton*'s regulatory estoppel holding to LMI. In a similar case, the same conclusion was reached. *Morton* drew support for its regulatory estoppel holding from *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498-99 (W. Va. 1992), which held that based on alleged regulatory representations, the "sudden and accidental" pollution exclusion was limited to barring coverage only for pollution damage which was intended or expected. Recently, on remand, the West Virginia state court in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, No. 88-C-96-F, Hearing Tr. at 13-14 (Oct. 5, 1993, W. Va. Circuit Ct.) (transcript in LMIal0l), rejected the policyholder's argument that all carriers, including Certain London Market Insurers, should be bound by the same estoppel holding. The court recited: "However, as a matter of fairness and due process, that principle, that estoppel, in my opinion, is not applicable to the London Market and other companies in this case who did not make such appearances, who were not represented by any associations, who were not connected in any way to any of the companies that were before the Insurance Commissioner during that time." (LMIal0l). The court

granted summary judgment to Certain London Market Insurers, construing the word "sudden" in the pollution exclusion according to its plain, temporal meaning. *Id.* at 16 (LMIa103). The same result based on the same principles of "fairness and due process" is required in the case *sub judice*. Therefore, LMI respectfully submit that *Morton*'s regulatory estoppel holding does not apply to the pollution exclusion in the LMI policies, regardless of the fact that the LMI policies from 1974-1977 used the "sudden and accidental" exception in the pollution exclusion. LMI simply did not participate in the alleged regulatory deception before the New Jersey Insurance Commissioner.

LMI point out that *Morton* expressly exempted non-standard pollution exclusions from its holding. 629 A.2d at 847. Most of the LMI policies with a pollution exclusion contain the NMA 1685 seepage, pollution, and contamination exclusion. JA.4976. The NMA 1685 pollution exclusion is clearly a "non-standard" pollution exclusion akin to the other non-standard London Market pollution exclusion clauses mentioned in *Morton*. 629 A.2d at 837-38. *A fortiori*, *Morton*'s regulatory estoppel holding does not apply to LMI's NMA 1685 pollution exclusion.

In short, *Morton*'s regulatory estoppel holding is neither facially nor logically applicable to *all versions* of the pollution exclusion in the LMI policies. *Morton* confirms that LMI correctly argued on summary judgment that the plain meaning of the word "sudden" in their pollution exclusions manifests a temporal element, requiring an abrupt discharge of pollutants. JA.4355, 4359. Moreover, *Morton* acknowledged that the literal language of the pollution exclusion renders it "actor neutral" and does not require that the character of the discharge be evaluated from the standpoint of the insured. 629 A.2d at 871. LMI respectfully submit that the district court committed reversible error when it construed the pollution exclusion in the LMI policies not to incorporate a temporal element. In the case *sub judice*, the non-sudden (gradual) nature of CLTL's polluting discharges into the unlined waste water lagoons is an established fact not contested on appeal. FRCP 56(d) Order

¶¶ 3, 5, 21. LMI respectfully request this Court to reverse that part of the district court's Order of March 12, 1993, denying partial summary judgment to those LMI policies with pollution exclusions for any and all liability and to enter judgment as a matter of law to LMI whose policies have pollution exclusions.

B. Alternatively, Even If Morton's Regulatory Estoppel Holding Applies to LMI's Pollution Exclusion, The District Court Incorrectly Instructed The Jury Or Alternatively Erred In Failing To Grant LMI's Motion For Judgment As A Matter Of Law.

Assuming *arguendo* that *Morton*'s regulatory estoppel holding applies to the LMI policies, LMI as a prefatory matter would regard such a result as violative of their fundamental due process rights to a full and fair hearing on the regulatory estoppel issue. In any event, LMI contend that they would still prevail on their pollution exclusion under the undisputed factual record. Under *Morton*, the pollution exclusion bars coverage for environmental contamination if the insured or its authorized agent intentionally discharged or released known pollutants. In the case *sub judice*, all these criteria plainly exist. All the polluting discharges which harmed the soils, groundwater and wetlands in and around the Bridgeport Terminal for which CLTL is obligated to remediate took place at the terminal under its control and at its direction. FRCP 56(d) Order ¶¶ 3, 5. *Morton*'s requirement that the insured be actually involved in the pollution causing process is satisfied. Next, the district court found as a matter of law that CLTL "intended to discharge known environmentally hazardous contaminants into the soil at the Bridgeport site." FRCP 56(d) Order ¶ 22. Thus, *Morton*'s intentional-discharge requirement is also met. Finally, *Morton*'s scienter requirement, i.e., that the policyholder knew of the contaminant quality of the substances being discharged, is firmly established in the factual record. The district court found as a matter of law that CLTL "was aware of the environmental hazards of the contaminants it placed into the rinsewater treatment system" and

"knew that its rinsewater treatment system resulted in known contaminants settling in the soil at the bottom of the ponds and lagoons." FRCP 56(d) Order ¶¶ 18, 20. The district court, therefore, committed reversible error when it failed to grant partial summary judgment to LMI on the pollution exclusion.

Furthermore, *Morton* engrafted a scienter requirement limited to the contaminant quality of the substances being released. The notion of a second scienter requirement that the insured must also know the migratory path of the contaminants through the environment is hostile to the discharge-versus-damage distinction in the pollution exclusion. A double scienter requirement that an insured must intend to discharge known contaminants into a known environmental medium to preclude coverage would perforce collapse the pollution exclusion into the basic coverage requirement under the "occurrence" clause that the insured neither intend nor expect damage. *Morton* recognized that a supplemental scienter requirement would eviscerate the exclusion and expressly declared that the pollution exclusion would be interpreted to preclude coverage "irrespective of whether the resulting property damage was intended or expected." 629 A.2d at 875; *accord A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 F.2d 66, 72 (lst Cir. 1991); *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267, 1271 (3d Cir. 1992), *cert. denied*, 61 U.S.L.W. 3714 (Apr. 19, 1993); *Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601, 607 (10th Cir. 1992). Therefore, the district court committed reversible error when it erroneously instructed the jury, over the carriers' objections, that the carriers could avoid coverage for groundwater contamination by reason of the pollution exclusion only if they proved that CLTL expected or intended to discharge contaminants into the groundwater at the Bridgeport Terminal. JA.14429-30.

Before trial, the district court found as a matter of law that CLTL "knew that the contaminants it placed into the rinsewater treatment system were seeping into the soil" and had "left the ponds and lagoons unlined because one of the goals of the rinsewater treatment system was to utilize the soil in the

cleaning process." FRCP 56(d) Order ¶ 19. Since CLTL intended or expected discharges of industrial wastewater into the unlined ponds and lagoons from 1960 to 1975, it was immaterial that CLTL did not know of the future consequences from its intentional waste discharges, including the continued percolation of contaminants into groundwater, or even that it did not consider the possibility of groundwater contamination from its polluting discharges. Under either *Morton*'s regulatory estoppel holding or its plain meaning, the pollution exclusion in the LMI policies bars insurance coverage for groundwater pollution. could support a general declaration that every exposure to any of the drugs at issue in this case causes injury, and therefore triggers coverage under the AHP policies.') CLTL failed to carry its burden of proving actual damage occurred in 1960 which *Hartford* requires. The sursummary v judgment for CLTL on the 1960 policy year must be reversed.

IV. The District Court Erroneously Denied LMI's FRCP 50(a) And 50(b) Motions For Judgment As A Matter Of Law Because Of The Absence Of Proof Of The Date(s) Of Actual Environmental Damage.

As to LMI's FRCP 50(a) and 50(b) motions on the ground of CLTL's failure to prove actual environmental property damage at Bridgeport, the district court did not articulate reasons for denying the initial FRCP 50(a) motion, but its ruling of April 22, 1993, on the FRCP 50(b) motion explained in pertinent part that "the testimony of Dr. McLane, in conjunction with the deposition testimony of Mr. Elston as relied upon by Dr. McLane, constituted sufficient evidence relating to property damage to warrant jury consideration." 11/8/93 Op. at 4 (Exh.I). The denial of LMI's motions for judgment demonstrates that the court did not obligate CLTL to the standard of "injury in fact" which it enunciated on summary judgment. At trial, Harry Elston testified that not all chemicals or liquids transported in the tankers cleaned at Bridgeport were harmful. JA.9661. CLTL's current president testified that even now only about 25-30 percent of the chemicals hauled by CLTL could be deemed hazardous. JA.9572.

CLTL's expert hydrogeologist, Dr. McLane, testified repeatedly to his inability to identify the toxic substances found in the tankers being cleaned at the Bridgeport Terminal prior to 1970. JA.10842, 10847, 10883, 10895-96, 10954. Dr. McLane acknowledged the relationship between actual damage and the chemicals entering the waste stream when he testified in connection with the issue of when damage to the swamp took place, that "it depends on the nature of the chemicals that are received. "JA.10880-81. Also, the USEPA's Risk Assessment Report noted the lack of pre-1970 records which identified the toxic substances entering the influent stream at the Bridgeport Terminal which could have potentially found their way into the soil, groundwater and wetlands. JA.13577. Hence, under *Hartford*'s damage-in-fact approach, CLTL failed to carry its burden at trial of proving the time of actual environmental damage from the specific hazardous substances driving the selected remedial measures. Yet, notwithstanding the repeated arguments of LMI's counsel that CLTL had not established when specific hazardous substances entered the Bridgeport unlined seepage lagoons from 1961 to 1970 as part of the tank wash rinsewater, the district court still denied LMI's FRCP 50(a) and 50(b) motions. The point of the foregoing is simply that the court gave only lip service to the damage-in-fact approach required by *Hartford*, disregarded damage-in-fact in its application, and followed *Keene*'s holding that "[regardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of an injurious process is enough for it to constitute 'injury' under the policies." *Keene*, 667 F.2d at 1046. LMI respectfully submit that the district court failed to adhere to the damage-in-fact standard which *Hartford* requires. Moreover, in light of the district court's jury instruction requiring that the jury find whether CLTL expected or intended the specific damage for which remediation is necessary, CLTL perforce had the obligation to prove the time of actual environmental damage derived from the specific environmental damage caused by the priority pollutants. In sum, judgment must be entered for LMI for policy years 1961 to 1970.

V. The District Court Erroneously Instructed The Jury On The Meaning Of "Property Damage" Which Misled The Jury To Find The Existence of Property Damage Without Proof of Actual Environmental Damage.

Over the carriers' objections, the district court instructed the jury on the meaning of

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-5777, 93-5794

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CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant in No, 93-5794

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*

Defendants-Appellants in No. 93-5777

On appeal from the Final Judgment
of the United States District Court
for the District of New Jersey,
Civ. No. 89-1543 (SSB)

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CHEMICAL LEAMAN TANK LINES, INC., v. THE AETNA CAS. & SUR. CO., ET AL

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CONCLUSION

For the reasons stated, the motions for reconsideration of the Court's July 21, 1993 decisions should be denied, except that the Attorney General takes no position with respect to insurers who did not participate in any way in the misleading filing with the Department of Insurance.

Respectfully,

FRED DeVESA
ACTING ATTORNEY GENERAL
OF NEW JERSEY

By: /s/ Karen L. Jordan
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Dated:

Found in LMI Appendix at LMIa79, 101, 103

asserted before our Insurance Commissioner, that this did not change the prior policies, which, of course, centered on the expected and intended and occurrence languages therein and did not make any change in them.

I certainly cannot disagree with that. That matter wasn't fully argued before me, or if it was it was certainly something that I missed. But I think the Supreme Court correctly handled that matter.

However, as a matter of fairness and due process, that principle, that estoppel, in my opinion, is not applicable to the London Market and the other companies in this case who did not make such appearances, who were not represented by any associations, who were not connected in any way to any of the companies that were before the Insurance Commissioner during that time.

It would seem, despite the fact that Mr. Ginsberg indicates somewhat of a dual law, if we get that far, but, nevertheless, I think fairness and due process prevail over that and that since they were not there, in my opinion, obviously subject to review by the Supreme Court, they would not hold the London Market to that same principle, or that they would not hold that they were estopped from asserting their insurance policies and general contract law.

Having looked at the briefs and the memos and considered the arguments of both sides, I believe that our Court would give it its ordinary interpretation, and that is that it has a temporal type of meaning. To do otherwise, I think, would render it almost meaningless. I think the common principles would apply. I don't find it to be ambiguous. Of course, ambiguity many times is in the eye of the reader or the litigant. But I think it has to have some real ambiguity, and I don't see it in this case.

I find our Court giving it its ordinary meaning, and therefore "sudden" means "sudden." And having found and the Supreme Court having found that this was done over a long period of time, the Court will grant the motion for summary

judgment by the London Market and enter judgment for them for the years that the pollution exclusion was included in the contracts.

And those years would be what?

MR. McLAUCHLAN: October 1971 forward.

THE COURT: Is that correct?

MR. GINSBERG: Your Honor, the first layer of the policy would be the beginning of October 1971; for

IN THE
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Appellee,

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AETNA CASUALTY AND SURETY CO.,

Appellant in No. 93-5794

and

ROBIN ANTHONY GILDART JACKSON,
An Underwriter at Lloyd's, London, et al.

Appellants in No. 93-5777

On appeal from the Final Judgment
of the United States District Court
for the District of New Jersey,
Civ. No. 89-1543(SSB)

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ARGUMENT

I. The Trial Court Erred As A Matter Of New Jersey Law In Instructing The Jury That Chemical Leaman "Expected Or Intended" Damage Only If It Subjectively Expected The Specific Harm That Was Ultimately Found At The Bridgeport Site.

A. Under New Jersey Law, An Expectation Of Some Sort Of Environmental Injury Is Sufficient To Preclude Coverage Unless The Specific Injury Caused Was Improbable.

If Chemical Leaman "expected or intended" to cause any injury to the environment by dumping contaminated wastewater into the unlined lagoons at the Bridgeport site, then Aetna was entitled to judgment in this case on all its policies - whether or not they contain a pollution exclusion clause. On this issue, Chemical Leaman argued vigorously that an expectation of *some* environmental harm was not enough; rather, the jury was required to find that it expected the *particular* "property damage that's found today at the Bridgeport terminal in the soil, the groundwater, and the swamp." JA 11425 (Closing argument). Chemical Leaman's key witness, Harry Elston, was advised as early as 1960 of the fact that Chemical Leaman's dumping was causing environmental problems. He testified at trial, however, that he did not expect the "permanent" contamination of the soil, or the pollution of the groundwater, because he believed that bacterial action and percolation through the soil under the ponds would eliminate the contaminants. JA 9693-9; 9928-9.

At the time of trial, New Jersey law on this issue was established by *SL Industries, Inc. v. American Motorists Ins. Co.*, 128 N.J. 188, 607 A.2d 1266, 1278 (1992):

> Assuming the wrongdoer subjectively intends or expects to *cause some sort of injury*, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable,

> however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was "accidental" and coverage will be provided. (emphasis supplied)

Accord, Voorhees v. Preferred Mutual Ins. Co., 128 N.J. 165, 607 A.2d 1255 (1992). In *Morton Int'l. Inc. General Accident Ins. Co. of America*, 134 N.J. 1, 629 A.2d 831, 879 (1993), decided after the trial but before the trial judge's ruling on Aetna's motion for judgment under Rule 50(b), the court reaffirmed the *SL Industries* test, and further explained that in cases of environmental pollution,

> [W]e acknowledge the impracticality of adherence to the general rule that "we will look to the insured's subjective intent to determine intent to injure." *Voorhees, supra*, 128 N.J. at 185, 607 A.2d 1255. Although insureds may concede that pollutants - even known pollutants - had been intentionally discharged, those insureds are virtually certain to insist that the resultant harm was unintended and unexpected. Absent "smoking gun" testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in coverage litigation.

Accordingly, *Morton* held that intent to cause an injury may be *presumed* from "exceptional circumstances" that objectively establish the insured's intent to injure. 629 A.2d at 880. (Emphasis supplied.) The Court approved numerous decisions holding that "continued discharges of pollutants over a prolonged period, combined with knowledge of the pollutants' deleterious qualities, is sufficient to establish an intention or expectation that environmental damage will occur." 629 A.2d at 884.

B. The Trial Court Erroneously Instructed The Jury That A Subjective Expectation Of The Specific Resulting Harm Was Required.

In accordance with *SL Industries* and *Voorhees*, the defendants requested that the jury be charged that "[i]f you so find that Chemical Leaman Tank Lines knew, expected or intended that its acts or omissions would result in some sort of third party injury or damage to the environment, then you must find that the plaintiff held a general subjective intention or expectation to cause some sort of injury," unless Chemical Leaman established "that the extent of the third party injury or damage was an improbable consequence of its actions or omissions." (JA 8873.)

The trial court rejected that instruction. Instead, it adopted Chemical Leaman's proposed instructions on the issue, requiring the jury to "focus on whether *the specific property damage* was expected or intended." (JA 11646; emphasis added). The court told the jury (JA 11646-7):

> Thus, even though Chemical Leaman may have knowingly and intentionally committed the acts that ultimately led to the environmental damage at the Bridgeport site, there may still be insurance coverage, so long as you find that Chemical Leaman did not expect or intend the specific property damage that is the subject matter of this litigation, namely contamination of the soil, groundwater, or wetlands.

Moments later, the court gave another instruction requested by Chemical Leaman, reemphasizing the point even more strongly (JA 11647):

> I further instruct you that, in deciding whether Chemical Leaman subjectively expected or intended to cause property damage, you must consider whether Chemical Leaman subjectively expected or intended the very damage that is the subject matter of this case. Thus, it is not sufficient for you to find that Chemical Leaman expected or intended any

> injury -- such as injury to the environment generally. Rather, you must determine whether Chemical Leaman expected or intended the actual property damage that is now required to clean-up.

The jury was thus precluded from finding for the defendants under the principle established by the New Jersey Supreme Court in *SL Industries* and reaffirmed by that court, in the context of environmental harm, in *Morton*: that the damage is not covered if the insured expected "to cause some sort of injury," and the actual injury that occurred was not "improbable." *SL Industries, supra*, 607 A.2d at 1278. This error in the jury instructions was extremely prejudicial, in view of the admission by Elston that Chemical Leaman knew the rinsewater contained environmental contaminants; that Chemical Leaman knew the contaminants would enter the soil beneath the lagoons; and that Chemical Leaman knew discharges from the overflow pipe would and did cause injury to the swamp. JA 9993-5, 10038-9 (Elston Tr.).

In its ruling denying the defendants' motion for a new trial, the trial court reasoned that its instruction was proper because it had concluded there was "sufficient evidence in the record to establish that the actual damages for which Chemical Leaman now seeks coverage . . . were an improbable consequence of th[e] discharges from the overflow pipe." Ex. G at 9. This conclusion was completely without foundation. *See* §II.B. at p. 28. The discharges from the overflow pipe, at least according to Elston (JA 10139-41), were minuscule compared with the release of contaminants into the soil and groundwater beneath the lagoons. But more important, the court was wrong when it took this issue from the jury as a matter of law. It was for the *jury* to decide, in accordance with the proper instruction submitted by defendants, whether the actual damage caused was an "improbable" consequence of its knowing and intentional acts. The erroneous instruction deprived defendants of a fair trial on the "expected or intended" issue, requiring a new trial on that issue under the policies for each year in question.

II. Applying The Correct Standard Under New Jersey Law, Aetna Was Entitled To Judgment As A Matter Of Law On The Ground That Chemical Leaman Expected Or Intended Injury From Its Deliberate Acts.

The evidence at trial left no doubt that Chemical Leaman expected some sort of environmental harm from its dumping of contaminated wastewater at the Bridgeport site, and that the harm it did cause was a probable consequence of its actions. Defendants were therefore entitled to judgment as a matter of law under the *SL Industries* standard described *supra*. Further, the evidence established the existence of each and every factor held by *Morton*, *supra*, to constitute "exceptional circumstances" from which an intent to cause injury should be presumed. Defendants were therefore entitled to judgment under the *Morton* standard as well.

A. Chemical Leaman Knew Its Dumping Of Wastewater Was Causing Some Sort of Environmental Injury.

In March 1961, the New Jersey Division of Fish, Game & Wildlife ("FGW') received a complaint that Chemical Leaman was placing "vile things" into "basins", at the terminal. JA 4444-5 (3/8/61 letter from William Frank). These "basins" were the unlined pits Chemical Leaman excavated when the terminal opened. Ex. B at 25. Effluent from one of the pits drained directly into the swamp. JA 11758 (9/12/61 inspection). FGW game wardens inspected the Bridgeport terminal on September 12, 1961. JA 11758. One week later, the FGW confronted Chemical Leaman and Elston with reports of fishkills apparently resulting from the escape of effluent from the unlined pits. JA 9989 (Elston Tr.); JA 11758 (inspection report). Elston did not deny responsibility, but instead asked how long Chemical Leaman might reasonably take "for this pollution to be corrected." JA 11759-11763. Elston was told to have all work completed and the "pollution stopped" by

September 1, 1962.[7] *Id.* In fact, however, Chemical Leaman did nothing of substance. At trial Elston admitted that Chemical Leaman's discharges had caused pollution and contamination of the swamp throughout the year following the September 1961 inspection.[8] JA 10038-39.

In 1966, another state agency, the New Jersey Department of Health ("DOH"), apparently stimulated by neighboring landowners, investigated a persistent air pollution problem at the site. JA 11701-704. The DOH's water pollution control personnel first focused on the site in October 1968 (JA 11718) and, in February of the following year, issued a Departmental Order directed to Chemical Leaman's improper method of disposing of contaminated waste. (JA 13352). The state accused Chemical Leaman of "discharging industrial waste and other polluting matter into a tributary of the Delaware River . . . thereby causing or threatening injury to the inhabitants of this State either in their health, comfort or property." New Jersey directed Chemical Leaman to "submit an engineering report on or before June 2, 1969, setting forth the proposed method of treatment and/or disposal to be employed by Chemical Leaman." While Chemical Leaman did not contest either the accusation or the order, it resisted compliance for the next 6½ years.[9] In the meantime, it continued business as usual by dumping its contaminated wastewater into the Bridgeport pits at the rate of 10,000 to 30,000 gallons a day, *i.e.*, 40 to 50 million gallons over that period. The DOH

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[7] Chemical Leaman's 1962 response was to dig three additional larger unlined pits, which, like the others, drained both into the sandy soil and directly into the swamp. JA 9707 (Elston Tr.).

[8] Elston also admitted that in 1969, he "knew and understood" that Chemical Leaman's discharges were doing some damage to the swamp. JA 9993-4.

[9] Chemical Leaman submitted a report dated May 27, 1969, JA 13355-363; JA 11777-782, which the DOH immediately rejected, noting that "[p]rovision of an adequate [wastewater treatment] system would probably cost [Chemical Leaman] much more than they would wish to invest." JA 11783.

sampled Chemical Leaman's "fully treated" effluent, as Elston called the "trickle overflow," JA 9705, that emptied into the wetlands. What the court below termed the "cleanest water," Ex. B at 27, the DOH called "highly pollutional." JA 11772-76 (Inspection report).

Elston testified that, until some time in the 1970's, he did not know unlined lagoons could contaminate groundwater. JA 9929, 9934-6. This testimony is demonstrably false. JA 11885; 11843-5. As set forth above, Elston knew in 1961 that Chemical Leaman was causing some harm to the environment at Bridgeport. JA 11842-5; 11885. By at least 1971, he had documented this awareness. In his May 20, 1971 memorandum to Chemical Leaman's president, Elston noted that the DOH had rejected Chemical Leaman's wastewater treatment proposal two years earlier and acknowledged that "a new system *must* be had." JA 11786-789.[10] In the same memorandum, Elston confessed that even a new system "would not eliminate the wastes" because he *did "not believe* that a waste disposal system can be designed to remove sufficient B[iological] O[xygen] D[emand], solids and *toxic materials* to meet the standards of the D[elaware] R[iver] B[asin] C[ommission]." *Id.* (emphasis supplied). Elston proposed that Chemical Leaman "[i]mmediately establish a proper combustion unit . . . so combustible oils and pumpable wastes both new and some existing can be properly disposed of." *Id.* (emphasis supplied). No such unit was ever placed in service. Similarly, despite operating at Bridgeport without permits for more than 10 years, Elston suggested the company begin to:

> [c]heck requirements for a permit to discharge treated waste into stream below our terminal; there is a New Jersey Swamp Lands Act that *prohibits*

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[10] The lower court refused to allow the jury to examine the portion of Elston's memo that stated that "the previous inexpensive means [of contaminated wastewater disposal] using . . . lagoons has not proven the best way," *Id.*, on the basis that the jury should not hear evidence concerning other Chemical Leaman sites. *See* Part III. *infra.*

> any *treated* waste waters from being discharged into wet swamp lands.

Id. (emphasis supplied).

Notwithstanding the ineffectiveness of Chemical Leaman's proposed system,[11] the New Jersey Department of Environmental Protection ("DEP"), the successor agency to the DOH, approved it. JA 13425 (October 16, 1973 letter). The approval document noted Chemical Leaman's promise to construct a proper treatment plant by mid-January, 1974. *Id.* Chemical Leaman broke that promise. In January, 1974, Chemical Leaman consented to a court order in which it promised to have a treatment plant built by mid-April, 1974. It also broke that promise. By May, 1974, the path of the discharge from the last pit (*i.e.*, the "cleanest effluent") could "be easily seen by looking for a 75' wide lane of dead trees." JA 11800 (DEP Memo).

Finally, in December, 1974, the DEP filed a motion to compel Chemical Leaman to obey the law and to live up to its commitments. JA 11824. Chemical Leaman was cited for its failure to skim the surface of its pits for six months or to dredge the bottoms for *ten years*. *Id.*[12] That motion sought to compel Chemical Leaman to "immediately begin installation" of the plant DEP had approved over a year before. JA 13425. The DEP also sought to "limit the amount of trucks [Chemical Leaman] cleans per day." Even more immediate was the prospect of "pay[ing] a penalty of $2,500 for each day of. . .operation from April 15, 1974 up until the final disposition of this matter." JA 11824-832.

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[11] In 1973, Chemical Leaman recognized that even its proposed treatment plant would have to be improved because even it would discharge 10.8 times more phenols and nine times more oil than allowed by the state standards. JA 11798-799.

[12] The record contained no evidence supporting the lower court's summary-judgment finding that the pits were, in fact, "periodically dredged." Ex. B at 36.

Chemical Leaman did not stop using its pit disposal system until 1975, when it hired DuPont to treat its wastes. JA 13473-82. Prior to entering into that contract, Elston admitted to DuPont that Chemical Leaman had "very little waste treatment" and was discharging waste into the wetlands. JA 11801-817. (In 1993, Elston directly contradicted this statement when he told the jury that unlined pits were as good as any other technology for treating chemical wastes. JA 9954-5.) Fearing that DuPont would not accept Chemical Leaman's waste in its current state, Elston told DuPont that the "present treatment ... could be improved to a standard you require." *Id.* Only after DuPont agreed in principle to accept Chemical Leaman's waste, JA 13461-466, did Chemical Leaman begin construction of a pretreatment facility.

Although Chemical Leaman stopped discharging wastes to the pits in 1975, Ex. D, ¶5, the contaminated residue of the earlier discharges remained for years. In 1977, one of the pits still contained "multicolored intensely malodorous substances." JA 11821-3. Incredibly, eight years after having been ordered by the DOH to cease using the pits for disposal purposes and to properly dispose of the wastes that remained, Chemical Leaman trenched through the dikes of the larger pits and drained approximately 80% of the remaining contaminated contents directly into the swamp, rather than pay DuPont for disposal and treatment. JA 11833-834. By that time, however, the vegetation in the swamp was already dead. JA 11835.

Before trial, the court properly found as a matter of law that Chemical Leaman "cannot reasonably contest the fact that it was aware of the, environmental hazards of the contaminants" it discharged into the unlined pits. Ex. B at 35. The trial court noted that

> [D]efendants have produced abundant evidence tending to establish Chemical Leaman's knowledge of the deleterious effect of its Bridgeport rinsewater treatment system on the soil and the groundwater.

Id. at 32. Additionally, the court recognized "[T]here can be no dispute that Chemical Leaman knew that contaminants were seeping into the soil" and that the *only* "factual" issue as to the contamination of the soil was whether Chemical Leaman knew that *permanent* damage to the soil would result. *Id.* at 36. Thus, there can be no doubt that the evidence established that Chemical Leaman subjectively expected "some sort" of environmental harm within the test established by *SL Industries* and reaffirmed in *Morton.*

B. The Actual Harm To The Enviromment Was Not Improbable.

The liability for which Chemical Leaman sought insurance coverage was the cost of the EPA-mandated cleanup of the Bridgeport site, which includes remediation of damage to the soil, to the groundwater, and to the wetlands adjacent to the site. While Elston testified at trial that he believed, at least until the early 1970's, that percolation of the wastewater through the sandy soil beneath the unlined pits would remove most of the contaminants, he conceded he knew it would not eliminate 100% of those contaminants. JA 9965. Moreover, the evidence showed that the groundwater was, at most, only 2½ feet below the bottom of the pits. JA 10866 (McLane Tr.)

The court in *Morton, supra*, made clear that even if one were to accept Elston's testimony that Chemical Leaman did not expect the severity of the soil and groundwater pollution that eventually occurred, this fact does not satisfy the "inherent improbability" test of *SL Industries, supra.* The *Morton* court observed, 629 A.2d at 882:

> [A]lthough the magnitude of the damage to Berry's Creek and the surrounding areas may exceed any intention or expectation attributable to Morton's predecessors, we do not consider that differences in harm relating to the severity of environmental damage give rise to a finding of "improbability" of harm that invokes the need for evidence of subjective intent. . . . Whether Morton's predecessors anticipated that discharges of untreated effluent on the plant site

> and into Berry's Creek for more than forty years would cause environmental harm of the severity [that occurred]. . ., hardly demonstrates that the extent of the injury was "improbable." (citations omitted)

The result in *Morton* -- summary judgment for the insurers based on lack of an "occurrence" -- compels a similar result in this case. As in *Morton*, Chemical Leaman's "continued discharges of pollutants over a prolonged period, combined with knowledge of the pollutants' deleterious qualities, is sufficient to establish an intention or expectation that environmental damage will occur." *Id.*, 629 A.2d at 884.

However, in ruling on the Rule 50 motions, it is clear that the trial court incorrectly focused on the "severity of environmental damage." The court below ruled:

> there is sufficient evidence in the record to establish that the actual damages ... were an improbable consequence of the[se] discharges from the overflow pipe.

Ex. G at 9. After *Morton* was decided, the court below elected not to revisit the issue in the context of the Rule 50(b) motion. JA 16677; Ex. H at 5-6. Even if the court below were correct on the law -- and it was not -- there was *no* evidence in the record that the actual damage was "improbable," even if one (erroneously) focuses solely on the discharge pipes from the impoundments. In fact, the only evidence as to probability directly contradicts the lower court's finding. Carrier expert Swanson testified that the existing soil, groundwater and wetlands contamination

> is the probable result of the discharge of . . . approximately one hundred million gallons of chemically laden waste water into six unlined ponds and lagoons. At least three of those ponds [were] dug below the water table. In addition the three ponds were also dug into the wetlands.

That testimony was not refuted by Chemical Leaman's expert, McLane. *See e.g.* JA 10986A3-5.

The only competent evidence on whether the resulting damage was "improbable" came from Swanson's testimony. That being the case, the court should have directed a verdict in the carriers' favor. The facts of this case do not allow for a verdict to be directed *against* the carriers. Moreover, the "facts" the court below relied upon, at best, showed the contamination merely "exceed[ed] any intention or expectation attributable" to Chemical Leaman. *Morton*, *supra*, 229 A.2d at 882. According to *Morton*, that finding, even if supportable, does not "give rise to a finding of 'improbability' of harm that invokes the need for evidence of subjective intent." *Id.* Applying New Jersey law as explained in *Morton*, the question of improbable damage simply does not arise in this case, and Chemical Leaman's expectation of *some* environmental injury requires judgment for the defendants on all policies at issue.

C. Even Without Proof Of Subjective Expectation Of Harm, The "Exceptional Circumstances" Evidence Established Chemical Leaman's Objective Intent to Injure.

In light of the overwhelming evidence of Chemical Leaman's subjective expectation of actual harm to the environment, this Court need not reach the additional principle established in *Morton*, *supra*, under which "in environmental coverage litigation, a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, exceptional circumstances [exist] that objectively establish the insured's intent to injure." 629 A.2d at 880, *quoting Voorhees*, *supra*, 128 N.J. at 185, 607 A.2d at 1265. This "objective" test was adopted by the New Jersey Supreme Court in recognition of the fact that "proof of subjective intent to cause environmental harm will rarely be available in coverage litigation," because "insureds are virtually certain to insist that the resultant harm was unintended and unexpected." 629

A.2d at 879. The carriers satisfy each and every element of the "exceptional circumstances" test of *Morton*.

Morton calls for examination of "all the available evidence" to determine the existence of five factors which constitute "exceptional circumstances". These circumstances objectively establish an insured's intent to injure the environment as a matter of law:

> [1] [T]he duration of the discharges, [2] whether the discharges occurred intentionally, negligently, or innocently, [3] the quality of the insured's knowledge concerning the harmful propensities of the pollutants, [4] whether regulatory authorities attempted to discourage or prevent the insured's conduct, and [5] the existence of subjective knowledge concerning the possibility or likelihood of harm.

629 A.2d at 880. *Morton* prescribes no minimum number of factors required to establish "exceptional circumstances." *Id.* Where, as here, all factors point in favor of objective expectation of injury, exceptional circumstances clearly exist.

1. The discharges were indisputably continuous and long-term.

Chemical Leaman discharged its pollutants into the unlined pits on a daily basis from at least March 1961, (*See* Ex.D at ¶¶3,5, 17) through August, 1975, when it hired DuPont. *See* JA 13473. In 1977, it made one final discharge when it cut the dikes of the last set of pits. *See* JA 11833-834. The jury found damage to the groundwater from 1960 to 1981, and to the wetlands from 1961 to 1978. JA 14421-23; 14426-27; 14419 jury interrogatories). Thus, the discharges were continuous, for a period of at least 14 years.

2. The discharges were indisputably intentional.

All of the discharges were intentional. Chemical Leaman used unlined pits to assure percolation of the effluent into and through the soil. JA 7206; 7210-7211.[13] *Morton* holds that once an insured is aware of "the unacceptable quality of its emissions . . . the discharges of pollutants thereafter occur intentionally." 629 A.2d at 882. New Jersey officials brought the "unacceptable quality" of Chemical Leaman's emissions to its attention in 1961. *See* JA 11758-59. The "inescapable conclusion" is that the discharges over the next decade and a half were intentional. *Id.*[14]

3. The evidence showed that Chemical Leaman knew the harmful propensities of its pollutants.

The court below found on summary judgment that Chemical Leaman knew its effluent's harmful propensities. Ex. D at ¶¶18-20, Ex. B at 35. No contrary evidence was adduced at trial. Elston testified that while many of the Chemicals were poisons, he also knew which ones were the "good ones on [the list]," JA 10163-64, and the numerous state agency contacts more than gave Chemical Leaman the specific knowledge it claimed it was previously lacking.

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[13] Based on this intentional discharge to the soil, the lower court granted summary judgment as to soil contamination as to all policies with pollution exclusions (1971-1981) Ex. B at 49. The jury similarly found intentional discharge into the wetlands at least from 1971 to 1978. JA 4431-2; *see also* JA 7202-7203.

[14] The trial court improperly focused on the intent or expectation that pollutants would secondarily migrate into the groundwater. *Morton* and *State of New Jersey, Dept. of Env. Prot. v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983) suggest that that is not the proper inquiry. *Morton*'s predecessors did not likely specifically expect or intend that fish, "present only when swept in by the tide" would be"irreversibly toxified." *Morton*, 629 A.2d at 834 (*quoting Ventron*, 468 A.2d 150, 154). Nonetheless, the court found *all* such discharges (and by inference, damages) intentional.

4. The evidence showed that regulatory authorities sought for 16 years to discourage or prevent Chemical Leaman's conduct.

In September, 1961, within 6 months of its first known use of the pits,[15] " the FGW gave Chemical Leaman a year to stop the pollution. Chemical Leaman's failure to obtain a permit for its facility delayed intervention by DOH pollution control personnel for 8 of the 16 years it took to force closure of the pits. The record here, like that in *Morton*, "fairly reflects a pattern of 'stonewalling' on the part of [the insured]." 629 A.2d at 882.[16]

5. The evidence admitted at trial conclusively proves that Chemical Leaman had subjective knowledge of the possibility or likelihood of harm, and evidence proffered on summary judgment but improperly excluded at trial conclusively proves that Chemical Leaman had subjective knowledge of the virtual inevitability of harm to the environment.

As discussed, *supra*, pp. 24-28, the evidence showed that Chemical Leaman had actual knowledge that it was causing harm to the environment. Even if this Court were not to view that evidence as necessarily demonstrating a subjective

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[15] The terminal opened in 1960, with no property damage occurring prior to April 1960. A March 1961 complaint led to the citation by the Division of Fish, Game & Wildlife in September 1961. JA 4444-45; JA 11758; *see* Ex. B at 25.

[16] Chemical Leaman's actions between 1969 and 1975 constitute "evasive conduct," *i.e.*, "a series of unfulfilled representations and undertakings to remediate the quality of its emissions..." *Morton*, 629 A.2d at 880-881. Chemical Leaman made even fewer efforts than Morton did to treat its waste before intentionally discharging it into the environment, in violation of pertinent statutes and the direct orders of regulatory authorities. Morton at least did take some action to remediate its discharge in early 1970. 629 A.2d at 880. In contrast, between 1962 and 1975, Chemical Leaman did nothing.

expectation of damage, at a minimum that evidence demonstrates "subjective knowledge of the possibility or likelihood of harm" under the exceptional circumstances test. In particular, even aside from the 1961 fish kills, JA9989, and the 1974 "lane of dead trees," as in *Morton*, "[k]nowledge that [the insured's] discharges were likely to cause harm was . . . inferable from the regular reports submitted and demands for ompliance asserted by state engineers. . . ." 629 A.2d at 882. The record on summary judgment also contained compelling evidence of Chemical Leaman's experience at other sites, both with pits and other disposal methods. That record revealed no genuine issue of material fact as to Chemical Leaman's knowledge that its disposal of the chemicals it transported could harm the environment. The court below held on summary judgment that Chemical Leaman knew "that the contaminants it placed in the rinsewater treatment system *would* cause damage . . . if not properly treated." Ex. C at 3 (emphasis added). Elston's admissions that in 1961, 1962 and 1969, he knew the final effluent was damaging the swamp, (JA 9992-4, 10038-9), even apart from other site evidence, shows his awareness that the wastes were not "properly treated."

Improperly excluded evidence of Chemical Leaman's and Elston's experiences at other, similar sites would have confirmed Chemical Leaman's subjective knowledge of the likelihood of harm beyond a reasonable doubt. *See* Part III, *infra*.

6. Chemical Leaman's waste disposal at Bridgeport was illegal throughout the pits' existence.

Consideration of "all the available evidence" as mandated by *Morton* compels a court to consider additional relevant factors as well. The very operation of the Bridgeport facility was illegal from the onset in the absence of a permit from the DOH (later the DEP), which Chemical Leaman neither applied for or obtained. JA 11772-73.

As early as 1958, New Jersey required a permit to operate a waste treatment or disposal facility. JA 11749 (N.J. Stat. Ann.

¶ 58:12-1 (repealed 1977)); JA 11752-53, (N.J. Stat. Ann. ¶ 58:12-3 (repealed 1977)). To obtain the permit, the operator was required to submit plans for DOH review and approval. Implementing regulations, (JA 11839), did not specify treatment methods because each installation was seen as unique. JA 11839A. However, those regulations do not permit the lagooning of industrial waste whatsoever.

In summary, the record in this case, even more strongly than the facts of *Morton*, conclusively demonstrated both on summary judgment and at trial that Chemical Leaman both objectively and subjectively "expected" to cause environmental damage and therefore cannot establish a covered "occurrence" under its insurance policies. This Court should reverse and remand with directions to enter judgment for the defendants under both tests codified in *Morton*.

III. The Trial Court Abused Its Discretion In Precluding Aetna From Using Evidence Relating To Other Chemical Leaman Wastewater Disposal Sites Either To Impeach The Testimony Of The Witness Elston, Or To Show Chemical Leaman's Subjective Knowledge Of Injury.

Chemical Leaman's key witness at and before trial was Harry Elston, who had been in complete charge of the design, construction, operation, and regulatory compliance of all its waste disposal sites nationwide from 1960 to 1983. JA 9957. For all practical purposes, Elston's knowledge was Chemical Leaman's knowledge. There was no more important witness in this case. At trial, the carriers proffered evidence of Chemical Leaman's and Elston's experiences and practices at other similar wastewater disposal sites, to prove Chemical Leaman's knowledge and expectation of pollution. The court below excluded such evidence by granting Chemical Leaman's motion *in limine* under Rule 403, Fed. R. Evid., just prior to opening statements. Ex. E at 5. The court excluded it again when the carriers offered it to impeach or rebut Elston's own testimony. These rulings flawed the jury's deliberations,

removing vital evidence from its consideration, and constituted a clear abuse of discretion.

A. The Trial Court Failed To Properly Anticipate New Jersey Law.

In *Morton*, the New Jersey Supreme Court mandated consideration of "all the available evidence" to determine whether environmental contamination was fortuitous. 629 A.2d at 880.

IN THE CIRCUIT COURT OF MERCER COUNTY
WEST VIRGINIA

JOY TECHNOLOGIES, INC.,

Plaintiff,

vs.

Civil Action
No. 88-C-96-F

LIBERTY MUTUAL INSURANCE CO., et al.,

Defendants.

The proceedings held before the Honorable John R. Frazier, Judge, Tuesday, October 5, 1993, commencing at 3:00 p.m.

JOHNNY JACKSON & ASSOCIATES
P.O. Box 1344
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800-621-1026

APPEARANCES:

JONES, DAY, REAVIS & POGUE (J. W. Montgomery, III, and Michael Ginsberg, appearing), 500 Grant Street, Pittsburgh, PA 15219, Counsel for Plaintiff.

CROWELL & MORING (Michael J. Zoeller, appearing), 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595, Counsel for California Union Insurance Company.

LAW OFFICES OF DAVID BURTON, (David Burton, appearing), P.O. Box 5129, 1460 Main Street, Law Building, Princeton, WV 24740, Local counsel for California Union Insurance Company.

LAW OFFICES OF JOHN H. SCOTT (John H. Shott, appearing), 621 Commerce Street, P.O. Box 873, Bluefield, WV 24701, Local counsel for Plaintiff.

LORD, BISSELL & BROOK (David R. Reed, Robert P. Arnold and David C. McLauchlan, appearing), 115 S. LaSalle, Chicago, IL 60603, Counsel for London Market.

Found in LMI Appendix LMIa 88-106

GORMAN, SHEATSLEY & HUTCHISON, L.C. (James R. Sheatsley, appearing), 343 Prince Street, P.O. Drawer AU, Beckley, WV 25802-2843, Counsel for London Market.

ALSO PRESENT:

Lawrence J. Lepidi

THE COURT: Good morning.

We have scheduled for trial this morning the case of *Joy Technology* versus *Liberty Mutual Insurance Company* and others, Case No. 88-C-96.

For the record, Mr. Jackson is our Court reporter, and he has been sworn in and given the oath as a substitute official court reporter at this time.

As we agreed at our last hearing, the jury selection has been delayed until tomorrow. Groups three, four and five have been scheduled to come in tomorrow.

This is their last week. Actually, tomorrow would be their last court day. So the Court was concerned that many of them had planned other matters beyond this Friday, which was their last day. So we will have to see what kind of response we get when we advise them that this trial could last two to three weeks. Some of them may have plans. I probably will be very liberal with excuses. So we will bring in all three groups.

Mr. Shott and Mr. Burton, I think we are looking at about 35 to 40 people at that time with all three groups. Has it dwinded down over the term?

Perhaps the first place we could start is to see if there have been any changes since our last hearing so far as the parties, any settlements, any other matters before we get to a couple of the main motions that I want to address.

MR. GINSBERG: Your Honor, just to confirm what we reported last week, we have reached settlements with Wausau,

American Reinsurance and Northbrook, and would request the Court to enter a conditional dismissal of those parties. We have not yet executed settlement agreements.

THE COURT: Northbrook, Wausau and ...

MR. GINSBERG: American Reinsurance.

THE COURT: That leaves the London Market, Cal Union and North River?

MR. GINSBERG: That's right.

I believe International Insurance Company is there in there for one period.

MR. ARNOLD: That's correct.

THE COURT: That is new to me, or maybe I missed that.

MR. GINSBERG: They have always been represented by the London Markets defendants counsel.

They have never filed a pleading in their own name. They are just one of the pieces of the London policies, one of the higher policies.

MR. ARNOLD: Right, Your Honor.

International has a percentage quota share of one London policy. And, again, we have represented them all along. As Mr. Ginsberg suggests, they never filed a separate pleading except for answers and so forth.

THE COURT: Anything else to report? Any negotiations still ongoing?

MR. GINSBERG: Your Honor, both Mr. Lepidi and Mr. McLauchlan have been having negotiations to report on.

MR. McLAUCHLAN: I would just state that Mr. Lepidi and I, as well as other counsel for both sides, met shortly after our court appearance last week and had some further discussions.

We have also discussed in principle what sort of agreement would be necessary, the terms and conditions, somewhat mechanical aspects in some respect.

But, nevertheless, I think we each wanted to be sure that if we could ever get together at least there wasn't another round of disagreement over the sorts of terms and conditions of any settlement agreements.

We sort of tried to move ahead on both fronts, on the one hand to discuss the form of an agreement, if we could reach one, and on the other hand to discuss dollars and cents. I think I can report that essentially we have made progress on both of those fronts.

The distance that we are apart is less, although still a great distance. And I think in terms of the settlement agreement, the form of the agreement, I'm not sure we are a hundred percent there, but we are pretty close on that aspect.

THE COURT: I take it the two of you all have full authority for your respective sides, in other words, not someone in London or Pittsburgh or Chicago that you have to deal with? Do you all have full authority?

MR. McLAUCHLAN: Full authority, I don't have the checkbook, if that's what you mean. Certainly, I have specific authority from my clients. There is no one else I have to deal with so far as that goes. But, actually, if any questions are raised, I have to contact London. And we obviously from here we have a five-hour time difference.

THE COURT: Which way?

MR. McLAUCHLAN: It is five hours later there. It would be three o'clock, quarter to 3:00 in the afternoon there.

THE COURT: Do they close down at a certain time?

MR. MCCAUCHLAN: Pretty much 5:30. It gets dicey trying to contact somebody after 5:30.

THE COURT: So after noon there is not much negotiating going on, I guess, here after noon.

MR. McLAUCHLAN: That would be correct.

MR. LEPIDI: Your Honor, I would have to obtain final approval from our chief executive officer. We have made arrangements so I can contact him by phone today. He is aware of the situation.

THE COURT: Was there anything else to bring us up to date from last week before I guess we take on some of these partial dispositive motions, I suppose we would call them? Anything else?

MR. BURTON: Judge, I think before we start, Mike Zoeller is here with Cal Union. He has been here on several occasions, but I would like to introduce him to the Court. He is a member of the D.C. bar.

I move his admission for today's hearing; and depending on the Court's rulings from Cal Union's standpoint, he may or may not be with us for a while.

I would also like to introduce David Reed from Lord Bissell and Brook. It's my understanding that David is here for the duration. He is a member of the Illinois bar.

I move both of these gentlemen's admittance for the purposes of this matter.

THE COURT: I take it there is no objection?

MR. GINSBERG: No.

THE COURT: Without objection, the Court will accept both counsel to participate in this case.

Anything else?

Two matters I want to take up at this time are the motion by the London group for summary judgment for the years that their policies had the pollution exclusion and also the motion by Joy for partial summary judgment on the issue of appli-

cability of the Supreme Court opinion on the issues of expected and intended and occurrence.

We can take the first matter first. Anybody want to add anything to the briefs and motions that we have as far as the pollution exclusion motion?

MR. ARNOLD: Your Honor, I think Your Honor has heard ample arguments on the motion with respect to the pollution exclusion. I certainly don't think that I have anything to add to the argument Your Honor has already heard and what's been submitted in our briefs on that motion.

I would be happy to entertain any questions Your Honor might have, but beyond that I don't have anything to add to it this morning.

MR. GINSBERG: Your Honor, we have also briefed that issue. As you know, the position that Joy takes is that the London exclusion is, in essence, the same, they have admitted that it is the same as that contained in the Liberty Mutual policies.

They were under an obligation by this Court's order to present that issue to the Supreme Court of Appeals, to this Court at the time Liberty Mutual presented theirs.

No Court has ever held that the London pollution exclusion is different than the domestic pollution exclusion.

Those Courts that have interpreted the domestic exclusion the way the Supreme Court of Appeals has interpreted it have also interpreted the London exclusion the same way.

Those Courts that have enforced the pollution exclusion in the way that the insurers would have it read have also enforced the London exclusion.

So there's no difference between the two exclusions. It is illusory to pretend that there is. I would submit that the Supreme Court of Appeals if presented with the issue of the interpretation of the London exclusion would interpret it the

same way as the domestic exclusion for the reasons we have set forth in our papers.

MR. ARNOLD: Your Honor, if I may might respond to that very briefly. As Your Honor is aware, it is our position what the Supreme Court did in its decision with respect to the Liberty Mutual exclusion was not interpret it; it was to apply in fact judicial estoppel against Liberty Mutual. And you have heard us argue that the bases for that estoppel, representations regarding policy language made before West Virginia Insurance Commissioner, don't apply to London policies in this instance.

So we think the interpretation, pure interpretation of either the Liberty exclusion or the London exclusion remains an open question.

We think we have set forth in our briefs the reasons why the London exclusion is unambiguous and clearly operates to bar coverage for releases of pollution that are gradual, ongoing, continuous.

Your Honor has already found as a matter of fact that that was the nature of the releases in this case; and that, we think, leads to the conclusion that the exclusion is effective to bar Joy's claims under those policy years in which the exclusion appears.

And the interpretation, again, question, was not resolved by Supreme Court. And we feel that if the Court were to take on the interpretation of the London exclusion, under principles of contract interpretation that we cited in our briefs, once again, there is no way that the Court could conclude other than the exclusion unambiguously bars the claims that are at issue here.

MR. GINSBERG: Briefly, Your Honor, the result you would see if London's argument was correct is that the same policyholder, the policies in the same year and dealing with the same issue, the same fact situation, were suddenly to be one thing in the Liberty Mutual policy and something else in the London policy that sits right above it, so that there would

be coverage under the Liberty Mutual policy, no coverage on the London policy for the same occurrence because exclusions which admittedly are identical or nearly identical in the language and the effect are interpreted to mean different things.

It's hard to conceive of a situation where a policyholder can predict that policies on top of each other, have one on top of the other, will have different meanings, different coverages for the same event.

An umbrella policy is supposed to cover those things that are covered by the primary policy but are beyond the limits of the primary policy. That's what those London policies do. That's why they were purchased. They are excess policies to protect when the dollars get beyond the levels of the primary policies. And it is just unconceivable that the policies can be interpreted that disparately for the same claim.

The Court: Thank you, gentlemen.

The Court has read and reread the opinion of the Supreme Court in *Joy Technology* versus *Liberty Mutual*. I don't think I have ever read an opinion so many times, even those few where I have been affirmed that I like to reach every once in awhile.

But, like I sure each of you, I continue to read it and seek guidance from the opinion regarding these matters.

Looking at it in its best light, I believe the Supreme Court wrote it with the intent of resolving some of the issues beyond the one that was submitted to them on the motion for summary judgment. Certainly, they didn't have to go as far as they did in their opinion; and we have to give it some meaning and some purpose.

I think they knew that we had a lot of issues here, and I think they took on a number of those, and I think it has some applicability.

In any event, with regard to the London Market and related companies' motion for summary judgment on the pollution exclusion, in reading the opinion, the Court finds that the basis for precluding Liberty and other association companies was the representation that they made before our Insurance Commissioner back in the sixties and seventies.

In my opinion, the Court never interpreted the pollution exclusion. They simply held that Liberty and other similarly situated companies were estopped from taking a position contrary to what they had asserted before our Insurance Commissioner, that this did not change the prior policies, which, of course, centered on the expected and intended and occurrence languages therein and did not make any change in them.

I certainly cannot disagree with that. That matter wasn't fully argued before me, or if it was it was certainly something that I missed. But I think the Supreme Court correctly handled that matter.

However, as a matter of fairness and due process, that principle, that estoppel, in my opinion, is not applicable to the London Market and the other companies in this case who did not make such appearances, who were not represented by any associations, who were not connected in any way to any of the companies that were before the Insurance Commissioner during that time.

It would seem, despite the fact that Mr. Ginsberg indicates somewhat of a dual law, if we get that far, but, nevertheless, I think fairness and due process prevail over that and that since they were not there, in my opinion, obviously subject to review by the Supreme Court, they would not hold the London Market to that same principle, or that they would not hold that they were estopped from asserting their pollution exclusion clause.

So having overcome that burden, the question is the interpretation of that. And the first question, of course, is which

law applies, the law of West Virginia or the law of Pennsylvania.

Again, reading the opinions as best I can and knowing my friends on the Supreme Court, it appears clear that they would continue to use the exception under the prior case that made the law of the forum applicable; and that exception would be that you look at whether West Virginia had more contact, more relationship with the circumstances and events than the jurisdiction where the contract was entered into.

I see no difference in the law as they applied it in *Liberty* and the law that would be applied to the London Market in this case and therefore find that the law of the State of West Virginia would apply to the exclusion clause.

The question then becomes how would West Virginia interpret that pollution exclusion clause. Of course, the more difficult questions are the ones that have been presented.

We have no cases on point. We have a lot of cases, of course, on interpretation of contracts, insurance policies and general contract law.

Having looked at the briefs and the memos and considered the arguments of both sides, I believe that our Court would give it its ordinary interpretation, and that is that it has a temporal type of meaning. To do otherwise, I think, would render it almost meaningless. I think the common principles would apply. I don't find it to be ambiguous. Of course, ambiguity many times is in the eye of the reader or the litigant. But I think it has to have some real ambiguity, and I don't see it in this case.

I find our Court giving it its ordinary meaning, and therefore "sudden" means "sudden." And having found and the Supreme Court having found that this was done over a long period of time, the Court will grant the motion for summary judgment by the London Market and enter judgment for them for the years that the pollution exclusion was included in the contracts.

And those years would be what?

MR. McLAUCHLAN: October 1971 forward.

THE COURT: Is that correct?

MR. GINSBERG: Your Honor, the first layer of the policy would be the beginning of October 1971; for

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA
CIVIL DIVISION

JOY TECHNOLOGIES, INC.,

Plaintiff,

v.

No. 88-C-96-F

LIBERTY MUTUAL INSURANCE CO., *et al.*,

Defendants.

ORDER

This matter coming to be heard on the Motions of the London Market Defendants and California Union Insurance Company for Summary Judgment, oral argument having been heard on September 8, 1993, the Court hereby enters the following findings of fact and conclusions of law, as more fully set forth in the hearing Transcript dated October 5, 1993 and attached hereto:

1. Certain policies of insurance issued to Plaintiff by the London Market Defendants, California Union Insurance Company and North River Insurance Company contain a provision known as the "NMA 1685 Seepage, Pollution & Contamination Clause" (hereinafter the London pollution exclusion").

2. The West Virginia Supreme Court of Appeals in *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992) ruled that Liberty Mutual and other companies were precluded or estopped from taking a position contrary to what they had asserted before the West Virginia Insurance Commission regarding the application of the pollution exclusion which was contained in the Liberty Mutual policies.

3. The policies issued by the London Market Defendants, California Union and North River do not contain the exclusion which was the subject of the proceedings before the West

Virginia Insurance Commission. The rationale for the estoppel is not applicable to policies containing the London pollution exclusion.

4. The London pollution exclusion must be given its ordinary interpretation. The London exclusion is unambiguous and the term "sudden" as used in the London pollution exclusion has a temporal meaning.

5. Having found that the pollution at issue in this matter resulted from conduct which took place over a long period of time, this Court concludes that the Plaintiff's claims are barred by the London pollution exclusion and accordingly grants the London Market Defendants' Motion for Summary Judgment for the years that the London pollution exclusion was included in the contracts of insurance issued by the London Market Defendants. Summary judgment is also granted as to policies issued by California Union Insurance Company and/or North River Insurance Company which contain the London pollution exclusion.

IT IS HEREBY ORDERED THAT judgment shall be entered in favor of the London Market Defendants, California Union Insurance Company and North River Insurance Company in accordance with the findings and conclusions set forth herein.

To all of which the Plaintiff objects and excepts.

Dated this the 4th of February, 1994.

Entered nunc pro tunch as of October 5, 1993.

/s/ John R. Frazier

JUDGE JOHN R. FRAZIER

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Plaintiff(s) **CHEMICAL LEAMAN TANK LINES, INC.** vs. *Defendant(s)* **AETNA CASUALTY & SURETY COMPANY and certain underwriters at Lloyds, London**	Civil Action No. 89-1543 (SSB)

BRIEF OF AETNA CASUALTY AND SURETY COMPANY IN SUPPORT OF ITS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Found in Joint Appendix at JA 3766-3769, JA 3774-3787, JA 3873-74, JA 3885-86, JA 3896-99, JA 3903-95, JA 3909-11

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PRELIMINARY STATEMENT

Chemical Leaman Tank Lines, Inc. ("CLTL") has moved for summary judgment. Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Pb") appears, at first blush, to be comprehensive. More careful review shows that it fails to delineate the duty of this or any other court applying New Jersey law in an insurance coverage dispute.[1] One need not divine that duty from unpublished trial court opinions, even those of this Court. This Court's duty has been set forth by the New Jersey Supreme Court. It is to determine and fulfill the objectively reasonable expectations of the parties.

Aetna contends that those expectations are clearly set forth by the policies themselves, and that no interpretational aids are necessary to determine that CLTL's claim is meritless. However, should the Court be inclined otherwise, Aetna submits the following as bearing on the reasonable expectations of the parties. CLTL would avoid this, for it had no expectation of coverage for its liabilities here in issue.

In *Werner Industries v. First State Ins. Co.*, 112 N.J. 30 (1988), an insured was given the opportunity to demonstrate that it had an objectively reasonable expectation of coverage, despite contrary unambiguous policy language. In *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325 (1985), the insurance company was allowed to demonstrate the lack of any reasonable expectation and hence, no coverage, despite the fact that the Court held the applicable policy to be void, as violating public policy.

CLTL also ignores the controlling case on duty to defend,[2] the respective burdens of proof of the parties to the contract

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[1] This court has previously ruled that New Jersey law applies. While Aetna respectfully disagrees with that ruling, it frames its arguments herein accordingly.

[2] CLTL cites the trial court opinion in *CPS Chemical CO. v. Continental Ins. Co.*, 199 N.J. Super 558, 564 (Law Div. 1984) as imposing a duty to defend. *See* Pb 57. The Appellate Division *reversed* that holding, expressly citing *Hartford. Id.*, 203 N.J. Super 15, 20-21 (App. Div. 1985).

and the trigger of coverage[3] . *Hartford Accident & Indem. Co. v. Aetna Life & Casualty Co.*, 98 N.J. 18 (1984) ("*Hartford*"). As to these three issues, the New Jersey Supreme Court has ruled squarely against CLTL. First, CLTL is not entitled to a defense until it proves itself entitled to indemnity. Next, it is the burden of the party *seeking* coverage to prove that an occurrence, as defined in the policy, has taken place. Finally, it is that same party's burden to prove that property damage occurred during the policy period.

The Court may recall how long and hard CLTL fought to gain access to Aetna's internal documents regarding the history of the policies in issue.[4] CLTL accused Aetna of trying to litigate this case in secret, and of withholding "privileged" evidence damaging to Aetna, and producing only that which tended to damage CLTL.[5] The absence of any citation to these documents is ironic, until one realizes that this information refutes CLTL's claims.

CLTL seeks refuge in cases that assume what the parties' expectations are. Aetna respectfully moves this Court to determine the true objectively reasonable coverage expectations

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[3] Instead, CLTL cites a federal case as the "seminal" trigger case. *See* PB 42. Further "support" is allegedly supplied by *AC and S, Inc. v. Aetna Casualty & Surety Co.* 764 F. 2d 968 (3d Cir. 1985), although that case was decided under Pennsylvania law. *Compare id.*, 764 F. 2d at 971 *with* Pb 44-45. Also curious is the citation of *Gottlieb v. Newark Ins. Co.*, 238 N.J. Super 531 (App. Div. 1990), which counsels *against* the indiscriminate invocation of the continuous trigger where a full factual record has not been developed. *Id.* 238 N.J. Super at 534.

[4] First, CLTL refused to consent to a protective order. Later, it disputed Aetna's privilege claims. In all, over 100,00 documents were produced by Aetna. CLTL also subpoenaed documents from the Insurance Services Office (ISO).

[5] Also ironic is that due to CLTL's challenge of Aetna's privilege log, this may be the first trial court to consider the genesis of the phrase "from the standpoint of the insured." Clearly, the drafter intended an objective test of expectation or intent. Moreover, as demonstrated *infra*, policyholders and their representatives appreciated this as well.

of the parties. Under New Jersey law, that is the proper inquiry.

Concomitantly, Aetna suggests that the Court consider the documents for which CLTL fought so hard. By so doing, this Court will not fall into the same trap as those courts which have solely relied policyholder published on commentaries regarding such documents. At the same time, Aetna appreciates the volume of these materials, and the time constraints facing the Court. To accomplish both purposes, Aetna respectfully submits a series of articles authored by its counsel. The evidence referred to in those articles are incorporate herein by reference as part of the record. They will be supplied to the Court and plaintiff under separate cover.[6] Review

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[6] Aetna counsel herein have written publicly on the evidence discussed in this brief. *See* Victor C. Harwood, III, Brian J. Coyle and Edward Zampino, *The Frivolity of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Insurance Litigation Reports No. 40 (August 27, 1991) (hereinafter referred to as "Mealey's I"). *See also* (same authors), *The Emperor's Illusionist: Policyholders Retreat from Pollution Extrinsic Evidence, (Part One)*, 6 Mealey's Insurance Litigation Reports No. 25 (May 5, 1992) (hereinafter referred to as "Mealey's II"). *Part Two* of this article is published in 6 Mealey's Insurance Litigation Reports No. 26 (May 12, 1992) (hereinafter referred to as "Mealey's III"). See also the same authors' article addressing the occurrence definition: *The Occurrence Definition and Extrinsic Evidence: The Diogenesian Search For the Reasonable Man*, 6 Mealey's Insurance Litigation Reports No. 31 (June 16, 1992) (hereinafter referred to as "Mealey's IV"). Aetna does not submit these articles as legal treatises or authorities. They are utilized for additional discussion of the comments herein on the factual evidence and to assist in placing policyholder assertions in proper context.

Aetna counsel does not wish to appear presumptuous by citing to its own published commentaries. However, Aetna counsel is simply unaware of other carrier counsel or independent, non-policyholder sources who have researched or written about this universe of extrinsic evidence. As above, the actual materials are being submitted under separate cover. Moreover, as counsel's research continues, these documents will be supplemented.

No reported New Jersey case has looked at this actual evidence, including *Broadwell v. Fidelity Cas. Co.*, 218 N.J. Super 516 (App. Div. 1987) and the "*Broadwell line of cases, i.e., Morton Int'l, Inc. v. General*

(Footnote continued)

of these sources, *i.e.*, documents unique to CLTL, and those applicable to other large sophisticated insureds like CLTL, can lead to only one supportable conclusion: CLTL had *no* expectation of coverage under Aetna's policies. As such, it is Aetna, not plaintiff, that is entitled to summary judgment.

Accident Ins. Co., A-895-89T3, slip op. (N.J. Sup. Ct., App. Div. October 2, 1991) (hereinafter "*Morton*"); *Summit Associates, Inc. v. Liberty Mutual Fire Ins. Co.*, 229 *N.J. Super.* 56 (App. Div. 1988); *CPS Chemical Co. v. Continental Ins. Co.*, 222 *N.J. Super.* 175 (App. Div. 1988); *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 *N.J. Super.* 156 (Law Div. 1982); *Lansco, Inc. v. Department of Environmental Protection*, 138 *N.J. Super.* 275 (Chan. Div. 1975), *aff'd* 145 *N.J. Super*, 433 (App. Div. 1976), *cert. denied*, 73 *N.J.* 57 (1977).

STATEMENT OF FACTS

CLTL has conveniently omitted any discussion of the histories of the corporation itself and its insurance program. Only by so doing could CLTL bring this motion. Evidence concerning CLTL's other sites refute its claims that "property damage" was neither expected nor intended.[7]

CLTL also asks the Court to ignore the differences in its policies, and reconstitute them into one policy that covers any liability that could possibly arise between 1960 and 1985. By plaintiff's reasoning, Aetna did not issue 25 one year policies with fixed liability limits. Rather, it must have issued one twenty-five (25) year policy, with a liability limit of approximately $23,000,000.00.[8] By so doing, policy deductibles (instituted in 1968) and retrospective rating premiums (in pre-1968 policies) are deleted, giving CLTL yet even more "free" coverage.

Similarly, CLTL avers that its pre-1961 "caused by accident" policies afford the same coverage as subsequent "occurrence" policies.[9] The fact that CLTL's 1961-1967 policies were specially endorsed to afford coverage on a defined "occurrence" basis refutes CLTL's attempt to rewrite the policies. CLTL was sophisticated enough to obtain a form of coverage that most other insureds did not enjoy until the 1966 policy was promulgated. The continuous trigger is yet another method of "consolidating" the policies in issue.

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[7] Aetna uses the term "property damage" as it has been interpreted by the court.

[8] Insureds often claim that insurer took "substantial" premium dollar and now seek to walk away from their insureds. Of interest is that for the 1964-65 policy year, CLTL paid a deposit premium of $77.50 which was subject to adjustment, depending upon CLTL's actual losses and exposure, for $500,000 worth of general liability property damage coverage.

[9] *See* Pb 16 and n.8 *Linden Motor Freight Co. v. Travelers Ins. Co.*, 40 N.J. 511 (1963) did not address a general liability policy. *Linden* dealt with an "accidental means" interpretation. It does not support the retroactive transformation of an accident based policy into an occurrence policy.

Simply put, CLTL had neither misgivings nor misunderstandings concerning its liability insurance program. Just what constituted a covered accident or occurrence was explained to and understood by CLTL. What follows are just some indications of that knowledge, and CLTL's sophistication in insurance matters. This includes the amount of coverage, its scope, and premiums therefor, as negotiated by CLTL's broker. This overview is presented to the court, before presenting argument, because such sophistication bears upon both reasonable expectations and the principles of contract interpretation. *Werner Industries, supra.*[10] CLTL understood the scope of its coverage, including the meaning and effect of the pollution exclusion clause in Aetna's policies.[11]

A. CLTL's Insurance Committee

By March 1960, CLTL had an Insurance Committee. See Aetna Exhibit 1; *See also* H. Hannold dep. at 35-5 to 36-10.

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[10] The "sophisticated insured" doctrine is well entrenched in New Jersey and this Circuit. Judge Barry cogently explained the doctrine, and the reasons therefor, in *McNeilab, Inc. vs. North River Ins. Co.*, 645 F. Supp 525, 546-649 (D.N.J. 1986) *aff'd.* 831 F.2d 287 (3d Cir. 1987). The opportunity and capacity to negotiate aspects of coverage, well documented in this case, was sufficient to jettison the doctrine of *contra proferentem*. See *also First State Underwriters v. Travelers Ins. Co.*, 803 *F.* 2d 1308, 1314 n.5 (3d Cir. 1986) (applying Pennsylvania law); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 794 *F.* 2d 871, 875 (3d Cir. 1986) (applying Pennsylvania law); *Eastern Associated Coal v. Aetna Casualty & Sur. Co.*, 632 *F.*2d 1068, 1075 (3d Cir. 1980) (applying Pennsylvania law). In accord are decisions outside of the Third Circuit. *See*, e.g. *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 *F.* 2d 1257, 1261 (5th Cir. 1976) *cert. denied*, 431 *U.S.* 967 (1976); *St. Paul Mercury Insurance v. Grand Chapter of Phi Sigma Kappa, Inc.*, 651 *F. Supp.* 1042, 1045 (E.D.Pa. 1987); *Industrial Risk Insurers v. New Orleans Pub. Serv., Inc.*, 666 *F. Supp.* 874, 881 (E.D. La. 1987); *Insurance Co. of N. Am. v. John J. Bordlee Contr.*, 543 *F. Supp.* 597, 602 (E.D. La. 1982).

[11] As detailed below, these explanations took place even before the exclusion was placed on to the policy and a number of years later, regarding a specific claim. This latter explanation was given in the presence of (if not presented by) an attorney retained by CLTL, David Kaliner.

The Committee was originally comprised of Howard Hannold, Earl Cox, Charles E. Fernald, Sr., Carlile King, Marian Chase and possibly Thomas Greenleaf.[12] *See* H. Hannold dep. at 24-28]. The members of the Insurance Committee changed over the years. Minutes of that Committee, produced by CLTL reflect that the members were upper level corporate executives, including counsel.

Howard Hannold was CLTL's insurance advisor as well as its broker. *See* Chase dep. at 11-9 to 21; 62-21 to 63-6. From at least 1964 on, Hannold was paid a retainer by CLTL. Clearly, Hannold was CLTL's agent, not that of the insurers. *See* H. Hannold dep. at 61-1 to 3.[13]

CLTL did not solely rely on Howard Hannold or John J. Manley, Inc. From 1965 to 1974, CLTL was a member of the American Society of Insurance Management ("ASIM"), later renamed the Risk and Insurance Management Society ("RIMS"). *See* Aetna Exhibit 6; *see also* Aetna Exhibit 7. This organization is discussed in more detail below. However, it is important to note that CLTL was a member at two most important times: the promulgation of both the 1966 policy and of the pollution exclusion.

B. Advice Given CLTL

One task of the Insurance Committee was to identify "gaps" in coverage. Hannold performed this task. *See* H. Hannold dep. at 46-17 to 48-20; *see also* Aetna Exhibit 8.

---

[12] Cox was the corporate treasurer for years; Fernald, a senior vice president. King, an attorney, was CLTL's general counsel. Mrs. Chase was assistant corporate secretary (later, assistant treasurer). Greenleaf was a vice president who later became president of CLTL. Hannold was a licensed insurance broker and principal of John J. Manley, Inc.

[13] *See also* Aetna Exhibit 2, where a soliciting broker was referred by CLTL to its "insurance consultant Mr. Howard R. Hannold." *See also* Aetna Exhibits 3 and 4 regarding Hannold's efforts to obtain competitive bids; and Aetna Exhibit 5, where Hannold made sure Aetna was not told of competition by other carriers.

CLTL was advised just what coverage it had with respect to waste disposal. *Id.* at 74-13 to 23. An accident was defined as "a sudden and unexpected event." An occurrence was defined as:

> also an accident, *but* it can occur over a period of time, *but* it's got to be unintended and unexpected and don't make any mistake about it.

Id. at 111-10 to 21 (emphasis supplied).[14] There need be no speculation as to how CLTL understood the terms accident or occurrence. Clearly, its accident based policies do not cover long term exposures which result in injury.[15]

C. CLTL's Understanding of the Pollution Exclusion

The exclusion of coverage for damage due to gradual pollution was highlighted at least twice for CLTL, even before its policies were endorsed. *See* Aetna Exhibits 9 and 10. The Secretary of the Insurance Committee recognized the endorsement as "a rather important change in our insurance". *See* Chase dep. at 37-9 to 38-19. It was discussed at the January 5, 1971 Insurance Committee meetings. *Id.* at 40-1 to 41-16. That the exclusion denied coverage for gradually caused pollution was "pretty well stated right here in [Hannold's] letter," (*i.e.*, Aetna Exhibit 9). *Id.* at 41-17 to 22. If, however, a "spill was sudden and accidental, it would be reported to the carrier." *See* H. Hannold dep. at 98-14 to 16.

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[14] Hannold and CLTL understood "accident" just as Aetna did; *i.e.*, the "classical" or "boom" case discussed below. The occurrence endorsement broadened coverage to encompass events which were not temporally sudden.

[15] This distinction was also discussed in RIMS publications. The "Explanations" of the 1966 and 1973 policies filed with state insurance commissions also made this clear. These are *quoted in* Mealey's I at 40 and endnote 57.

Hannold, CLTL's insurance broker and advisor, appreciated the temporal quality of the sudden and accidental exception to the exclusion:

> Q. With respect to the word "sudden", did you understand that the word had a time quality?
>
> A. *As I would explain to them*, that meant *immediate*. Whenever we explained coverage, if anything, we took a conservative stance.
>
> Q. Conservative, what do you mean by "conservative"?
>
> A. We would make sure that we were on the right side of the line, that nobody could misunderstand what we were saying.

Id. at 114-5 to 17 (emphasis supplied). Further, Hannold characterized the exception as "pretty clear to me". *Id.* at 114-3 to 4.

After apprising CLTL of the exclusion, Hannold was not asked to fill the coverage gap created by the exclusion. *Id.* at 115-13 to 18[16] ; *Cf. id.* at 46-47 to 48-20; and discussion below.

Coverage for bodily injury or property damage which arose out of the discharge, dispersal, release or escape of pollutants continued to be a source of discussion long after April 1, 1971, when the exclusion was first applied to a renewal policy. Years later, the exclusion was discussed among Hannold, his son James and individuals connected with the purchase of a large block of CLTL stock.

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[16] Plaintiff had not yet produced Insurance Committee Minutes memorializing the discussion of the pollution exclusion when Mr. Hannold was deposed. Pollution coverage was discussed with CLTL's Vice-President of Safety, Joseph Kavanagh. Unfortunately, Mr. Kavanagh (like many other members of the Insurance Committee) is deceased.

This discussion occurred in early 1978, after a product misdelivery accident caused multiple fatalities at a Chicago tannery. *See* J. Hannold dep. at 72-4 to 73-14. The incident prompted a meeting among the stockholders, their insurance broker, James and Howard Hannold, David Kaliner and Charles Fernald. *Id.* at 77-21 to 78-12.

Howard Hannold recalled the meeting as involving an "in depth discussion" regarding

> just what pollution coverage we did or did not have. And we explained to them that the accident in question was covered because it was a sudden act.
>
> Q. What do you mean by "sudden", Mr. Hannold?
>
> A. Well, let's say that I drive my car or I drive a truck into a tank and put a hole in it. That's sudden.

See H. Hannold dep. at 166-16 to 167-2.

James Hannold also recalled that CLTL's auditors were concerned with the coverage available for the tannery accident. *See* J. Hannold dep. at 75-14 to 77-9. He identified Joseph Szabo as one of the stockholders present; the other, possibly, being David Hamilton. *Id.* at 132-20 to 133-9.[17]

At this meeting, the intent and effect of the pollution exclusions at issue (*i.e.* those found in both Aetna's and the London policies) was to preclude coverage for

> gradual...for non-sudden and non-accidental claims, gradual pollution.

Id. at 81-19 to 82-1.

---

[17] James Hannold's recollection of the meeting is set forth in J. Hannold dep. at 75-11 to 82-20. At the time or shortly thereafter, both Szabo and Hamilton became CLTL corporate directors.

D. Other Evidence of CLTL Understanding

In 1980, CLTL forwarded articles concerning Environmental Impairment Liablity ("EIL") Insurance and environmental restoration coverage, the latter mandated by the Motor Carrier Act of 1980. CLTL's claims manager (with a copy to CLTL's president) asked James Hannold to "advise where we stand with our present coverage." *See* Aetna Exhibit 11.

Later, CLTL's insurance consultant was asked to explore EIL coverage, due to the impending EPA financial responsibility requirements. These requirements mandated coverage for gradual pollution. *See e.g.* Aetna Exhibits 12 and 13. CLTL declined to purchase such coverage then, and also, in 1985.

The quotes followed this CLTL inquiry of March 10, 1981:

1. Can existing liability insurance coverage, sudden and accidental, be utilized to meet the Regulatory requirements for specific Chemical Leaman terminal facilities, and if so, what is required, eg., site reviews, engineering evaluations and reports, etc., to establish the coverage?

2. *What would be required to ultimately obtain* liability insurance coverage, *non-sudden* and accidental, for three Chemical Leaman terminal facilities as interpretatively deemed required?

See Aetna Exhibit 14.(emphasis supplied).[18]

One infers that the response to these inquiries took the form of the EIL quotes. Even if not, subsequent events clearly indicate no coverage expectation. Significantly, evidence of CLTL's understanding consists of its responses to the United States Environmental Protection Agency ("EPA"). In 1985

---

[18] The EPA requirements are addressed below. Note, however, that CLTL was not sure whether it even had coverage pursuant to the EPA's "sudden" requirements, much less for EPA's gradual ones.

CLTL advised the EPA that it was *unsure* if it had insurance to satisfy Superfund liabilities. *See* Aetna Exhibit 15. By August 10, 1987, the doubt was gone:

Chemical Leaman *is not* privately insured against releases of hazardous waste. See Aetna Exhibit 16 at 3.

Factually, there can be no question about CLTL's actual coverage expectations. Those expectations - at least the contemporaneous ones - are set forth in the testimony of Marian Chase, the long time (1960-1976) Secretary of the Insurance Committee, and Howard and James Hannold, CLTL's insurance representatives throughout the period of coverage. Due to CLTL's egregious delay in reporting this claim, most others involved are deceased.[19] The foregoing clearly shows that CLTL was sophisticated in matters regarding insurance. Thus, it devolves upon the court to employ the proper rules of construction of these contracts, *not contra proferentem*.[20]

POINT I

HARM OBJECTIVELY EXPECTED BY A "REASONABLE MAN", REGARDLESS OF THE DEGREE OF HARM RESULTING FROM AN INSURED'S ACTS, WAS NOT INTENDED TO BE COVERED UNDER THE OCCURRENCE DEFINITION

Until 1966, CGL policies were triggered by accidents that caused covered damages. In 1961, (5 years before such coverage became universal) "accident" was replaced by "occurrence", a defined term in plaintiff's policies. For there to be an occurrence, the damage must be "neither expected

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[19] Messrs. Cox, Niness, Sr., Kaliner, Kavanagh and Szabo.

[20] Consider the explanation of ambiguity in *Weedo v. Stone-E-Brick*, 81 *N.J.* 233, 247 (1979), *i.e.* that ambiguity does not exist unless "the policy is *so* confusing" that the insured "cannot make out the bounds of coverage." (emphasis supplied).

nor intended from the standpoint of the insured".[21] In order for there to be coverage, an *insured* must prove that an occurrence took place. *Hartford v. Aetna*, *supra* at 26.

A. CLTL Bears the Burden of Proof as to All Elements of An Occurrence

The occurrence definition forms a part of the basic grant of coverage. It is not an exclusion. Therefore, the burden is not upon the carrier to prove that injury was expected or intended. It is on the insured to show it was not.[22]

Recently, the Third Circuit reached this conclusion. *New Castle Country v. Hartford Acc. & Indem. Co.*, 966 F.3d 1162, 1191 (3d. Cir. 1991):

> [T]o establish coverage the County must show that... it neither expected nor intended the environmental damage.

The weight of authority is in accord.[23]

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[21]The quoted phrase was not changed between 1967 and 1985. Earlier policies had different language, to similar effect.

[22] In *Habedank v. Atlantic Casualty Insurance Company*, 128 *N.J.L.* 338, 25 A.2d 889 (E&A 1941), the policy conditioned coverage upon use for commercial purposes. The party seeking coverage had to prove that the accident occurred while the vehicle was so used. *Bosshardt v. Commercial Casualty Insurance Company*, 124 *N.J.L.* 54, 11 A2d 49 (E&A 1940) involved an *exclusion* pertaining to commercial use. There, the burden was upon the insurer to prove the type of use to which the vehicle was being put at the time of the accident. Thus, New Jersey courts do not merely look at the effect of such a provision. *See also Weedo v. Stone-E-Brick*, 81 *N.J.* 233 (1982) which notes that the insuring agreement does not provide coverage for *all* property damage, only for that property damage "to which this insurance applies."

[23] *See e.g. In Re Acushnet River & New Bedford Harbor: Proceedings Re: Alleged PCB Pollution*, 725 F. Supp. 1264 (D. Mass. 1989 *Certified Question Answered in part by Lumbermens Mutual Casualty Company v. Belleville*, 407 Mass. 675, 555 N.E. 2d 568 (1990), *Answer to Certified Question Conformed to*, 938 F.2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ctr. 969 (1992); *Central Illinois Public Service Company v. Allianze*

(Footnote continued)

Plaintiff's contrary contention is wrong. *J.T. Baker, Inc. v. Aetna Casualty & Surety Co.* 135 F.R.D. 86 (D.N.J. 1989), as this Court knows, addressed a discovery dispute.[24] Motions filed in 1991 include Baker's for a declaration that the carriers *do* bear the burden of proof. This would be unnecessary, if the issue had already been decided.[25]

Simply put, the duties of an insurer are not triggered unless property damage results from an occurrence. "Occurrence" is a defined term, comprised of several elements, It is the insured's burden to prove that an occurrence has taken place in order to trigger a policy.[26] *Voorhees v. Preferred Mutual Insurance Co.*, 128 N.J. 165 (1992), notes that the duty to

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Underwriters Insurance Company, et al. No. 90L-11094 (11. Circ. Ct. Cook Cty., June 12, 1991) (slip Opposition. at 9) (*Appendix Tab A*); *The Boeing Company v. Aetna Casualty & Surety Company, et al.*, (*Appendix Tab B*); *Royal Globe Insurance Company v. Wittaker*, 181 Cal. App. 3d 532, 226 Cal. Rptr. 435 (Cal. App. 1986); *Lumbermen's Mutual Casualty Company v. Belleville Industries, Inc.*, No. 84-2676-Y, slip Opposition. at 35 (D. Mass. January 4, 1991) (Appendix Tab C).

[24] Note that the Magistrate Judge lacks jurisdiction to rule on such disposition matters. *See* 28 U.S.C. 636 (b)(1)(A).

[25] Neither *Baker*, *supra*, nor plaintiff appreciates that *Lyons v. Hartford Insurance Group*, 125 N.J. Super 239 (App. Div. 1973) *certif. den.* 64 N.J. 322 (1974) did not interpret the occurrence definition. *See* Pb 19. Indeed, an "identical clause... was considered an exclusion," for it express *was* an exclusion. Lyons *supra*, 125 N.J. Super at 244. The occurrence definition did not include the clause. *Ibid.*

Reliance on *Ambassador Insurance Co. v. Montes*, 147 N.J. Super 286 (App. Div. 1977), *aff'd* 76 N.J. 477 (1978) for this proposition is also misplaced. The occurrence definition was not before either Court; the Appellate Division "approach[ed] this case as thought the policy contained an *exclusion* for the civil consequences of one's intentional wrong doing. 147 N.J. Super at 291 (emphasis supplied). *See also* 76 N.J. at 482. *Cf. Baker, supra*, 135 F.R.D. at 90.

[26] The holding of *Hartford v. Aetna*, *supra* would have been quite different had it been Aetna's burden to prove that no bodily injury occurred during its policy period. By plaintiff's reasoning, the policy definition of "bodily injury" (which restricts coverage) is an exclusion.

defend cannot be triggered unless the underlying damage was caused by an occurrence. If not, "[l]iability for the injury would thus be 'excluded' from coverage". *Id.* at 180. The New Jersey Supreme Court placed quotation marks around "excluded". Had it considered the occurrence definition at issue an exclusion, these would be unnecessary. The occurence definition is not an exclusion. Rather it is a way that

> the insurance company limits its coverage to accidental occurrences to *preclude* coverage for insureds...

Ibid, (emphasis supplied). Plaintiff would like this Court to ignore the distinction between "exclude" and "preclude".

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIV. AC. NO. 89-1543 (SSB)
HON. JOEL B. ROSEN

CHEMICAL LEAMAN TANK LINES, INC., Plaintiff, vs. AETNA CASUALTY & SURETY COMPANY, ROBIN ANTHONY GILDART JACKSON, an underwriter at Lloyds, London, et al, Defendants.	DEPOSITIONS UPON ORAL EXAMINATION OF JAMES HANNOLD HOWARD HANNOLD

TRANSCRIPT of the depositions of James Hannold and Howard Hannold, witnesses, called for Oral Examination by the parties in the above-entitled action, said deposition being taken pursuant to Rules governing Civil Practice in the Courts of New Jersey, by and before ANN P. CONLON, a Notary Public and Certified Shorthand Reporter of the James J. Manley Agency and the Adams Mark Hotel, Philadelphia, Pennsylvania, on Tuesday, April 3, 1990, commencing at 10:00 AM.

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Video Tape Operator

I N D E X

WITNESS	DIRECT
JAMES HANNOLD	
By Mr. Lee	10
HOWARD HANNOLD	
By Mr. Lee	15

these documents during the course of your employment at John J. Manley, Inc.?

A. Yes.

Q. Do you recall if you authored both letters contemporaneous with the dates of both letters?

A. Yes.

Q. Mr. Hannold, could you identify who Stewart Smith Pennsylvania, Inc. is?

A. That was the firm that we placed business through for Lloyds of London or whatever. Lloyds or British companies or whatever.

Q. Was Stewart Smith Pennsylvania Inc. the broker for the umbrella coverage for Chemical Tank Lines?

A. Yes.

Q. In 1960, where was John T. Manley located?

A. It's either going to be 316 Walnut Street in Philadelphia or 1617 JFK Boulevard. You're picking a date 1960 and I don't remember exactly what year we moved.

Q. Was either office located in Philadelphia, Pennsylvania?

A. Both.

Q. How did you come about in 1960 to use Stewart Smith Pennsylvania, Inc. for the umbrella coverage?

A. I think Stewart Smith was a contact that Bill Cole had for years.

Q. Let's go off the record, take a break.

VIDEO OPERATOR: Counsel, we're going off the record at 15 hours and 12 minutes.

(There is a brief recess.)

VIDEO OPERATOR: Counsel, we're back on the record at 14 hours and 19 minutes.

Q. Mr. Hannold, I want to show you what has been previously marked as Defense Exhibit 117, which is a three-page document comprised of two letters. The first is a letter of August 15, 1961 to Earl Cox at Chemical Leaman Tank Lines, and bearing production numbers John J. Manley 4932 and 4933, and the second letter is dated August 23, 1961, again to

UNITED STATES DISTRICT COURT
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CIV. AC. NO. 89-1543 (SSB)
HON. JOEL B. ROSEN

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff,

vs.

AETNA CASUALTY & SURETY COMPANY, ROBIN ANTHONY GILDART JACKSON, an underwriter at Lloyds, London, et al,

Defendants.

VOLUME II

DEPOSITION UPON ORAL EXAMINATION OF HOWARD HANNOLD

TRANSCRIPT of the video-taped deposition of Howard Hannold, a witness, called for Oral Examination by the parties in the above-entitled action, said deposition being taken by and before ANN P. CONLON, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, at the Adam's Mark Hotel, Philadelphia, Pennsylvania, on Wednesday, April 4, 1990, commencing at 9:15 in the forenoon.

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ART CERUTTI
Video Tape Operator

I N D E X

WITNESS	CONTINUED DIRECT	CROSS
HOWARD HANNOLD		
By Mr. Lee	129	
By Mr. Mueller		173
By Mr. Houck		244

been an offshoot of the company and one may have been an insurance broker, but whatever, they did, they had a meeting in my office. I gave them a complete verbal rundown of just exactly what was going on. They seemed very pleased with what I told them.

I believe at the time there had just been a serious accident somewhat prior to that meeting. And I think that they were questioning coverage as to whether or not this so-called pollution would be a covered item under the policies. I think that resulted in an indepth discussion with these people about just what pollution coverage we did or did not have. And we explained to them that the accident in question was covered because it was a sudden act. The act was rather catastrophic. I don't remember what Lloyds paid, but I'm sure they paid a lot.

Q. What do you mean by "sudden," Mr. Hannold?

A. Well, let's say that I drive my car or I drive a truck into a tank and put a hole in it. That's sudden. In this particular instance, the act was the connection, presumed connection, of an unloading line to the wrong pipe. So there was one single act. It wasn't repetitive in anyway, it wasn't over a period of time. Hence, sudden. It's not a nice accident to talk about, as I recall. People came stumbling out of this building and many of them never got out. I forget how many were killed. But the mixture was volatile.

Q. Does the name "Horween Leather" --

A. Who?

Q. Horween Leather?

A. Leather, L-E-A-T-H-E-R?

Q. Right, refresh your recollection about this loss?

A. Not by itself, no.

Q. Was the company from Oakbrook, Illinois referred to as Oakbrook Consolidated, Inc.?

A. Probably.

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
JAMES PATRICK HANNOLD				
BY: MR. LEE	6			
BY: MR. MUELLER		119		

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
D 1000	Chemical Leaman Tank Lines, Inc., Minutes Insurance Committee Meeting, July 24, 1972, Production	9

has been marked as Defendant's Exhibit 208?

A. Chemical Leaman

Q. I'd like to draw your attention to the last page of this document. Under the "Item Heading 20, losses paid or reserved, sub section C" which reads, "state largest claim regardless of deductible ever made".

Could you read for the record what your handwritten comment is?

A. It shows "2/14/78," which would be the date of the accident and says "Horween Leather primary reserve, $500,000." RES means reserved.

Q. Do you recall this particular claim?

A. Yes, I do.

Q. What do you recall about that particular claim?

A. That it was a bad one.

Q. Do you recall the facts of the particular claim?

A. More or less, yeah.

Q. Could you state for the record what your recollection is?

A. Chemical Leaman Truck was making a delivery at a tannery in Chicago. I can't recall the name of the chemicals involved, but the Chemical Leaman truck had one chemical that was used in the process which was supposed to be unloaded at that plant into a tank. It was erroneously loaded we felt due to the fault of the people at the plant into the wrong tank. The mixture of the two chemicals caused a poisonous glass cloud to form in the plant resulting in I think it was eight fatalities.

Q. Okay. Mr. Hannold, with respect to the document marked as Defendant's Exhibit 208 to whom was the umbrella liability application sent to?

A. Stewart Smith, Philadelphia.

Q. With respect to the document which was previously shown to you as Defendant's Exhibit 205 to whom was the document marked as Defendant's Exhibit 205 sent to?

A. Stewart Smith, Philadelphia.

there or not. Dave Kaliner was there. He was an attorney on retainer to Chemical Leaman and a couple people from Oakbrook and their insurance broker. I can't remember their names.

Q. Can you identify the insurance broker for Oakbrook?

A. I don't recall. It may be the broker who now handles the account. I don't know 'cause I believe the account is now handled out of Chicago. But I don't know that.

And we had a fairly lengthy meeting on the entire loss. The people from Oakbrook and their broker reviewed the insurance policies, both primary and umbrella and the questions they raised as to the applicability of coverage seemed to center on the pollution exclusions on the policies.

Q. And what were their concerns about the pollution exclusion?

MR. HOUCK: Objection to the form of the question.

MR. LEE: Okay. I will withdraw the question and rephrase it as follows.

Q. What were the discussions that you recall about the pollution exclusion at this particular meeting at your office?

A. Again they sat down and they actually read through the policies. And we read through them with them. And again they zeroed in on the pollution exclusions, as I recall, in both the general liablity and the umbrellas. We went over them I think pretty much word by word to be honest with you and what they were concerned about was whether or not the insurance company could claim that that particular loss was not sudden and accidental thereby excluding coverage for this loss.

We stressed to them, and Dave Kaliner stressed to them, that that was not the intent of the exclusion to exclude a loss of this type and the coverage was available. We had a similar loss some years before.

Q. Why did you regard this particular loss as sudden accidental?

A. Because to us it was perfectly obvious it was. In other words, we had a sudden mixing of two chemicals in a tank and a sudden formation of a gas cloud in the building which killed eight people.

Q. Do you recall the comments that were made by David Kaliner specifically at this particular meeting?

A. Not really other than Dave Kaliner was a very imposing individual. And he would have made a very good politician because he was also very long winded. And I'm trying to put this nicely, he liked to let people know how intelligent he was and how much knowledge he did possess about a lot of things. So he went into a very long winded explanation of what he thought this -- these exclusions were intended to do. And he was a man who was also conversant in insurance because he also did do work for insurance companies.

Q. Do you recall if Mr. Kaliner during the course of this meeting